SUPREME COURT, U. S.

APR 10 1970

JOHN F. DAVIS, CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

APPEAL DOCKETED FEBRUARY 4, 1970
JURISDICTION NOTED MARCH 23, 1970

Blanchard Press, Inc., Boston, Mass. — Law Printers

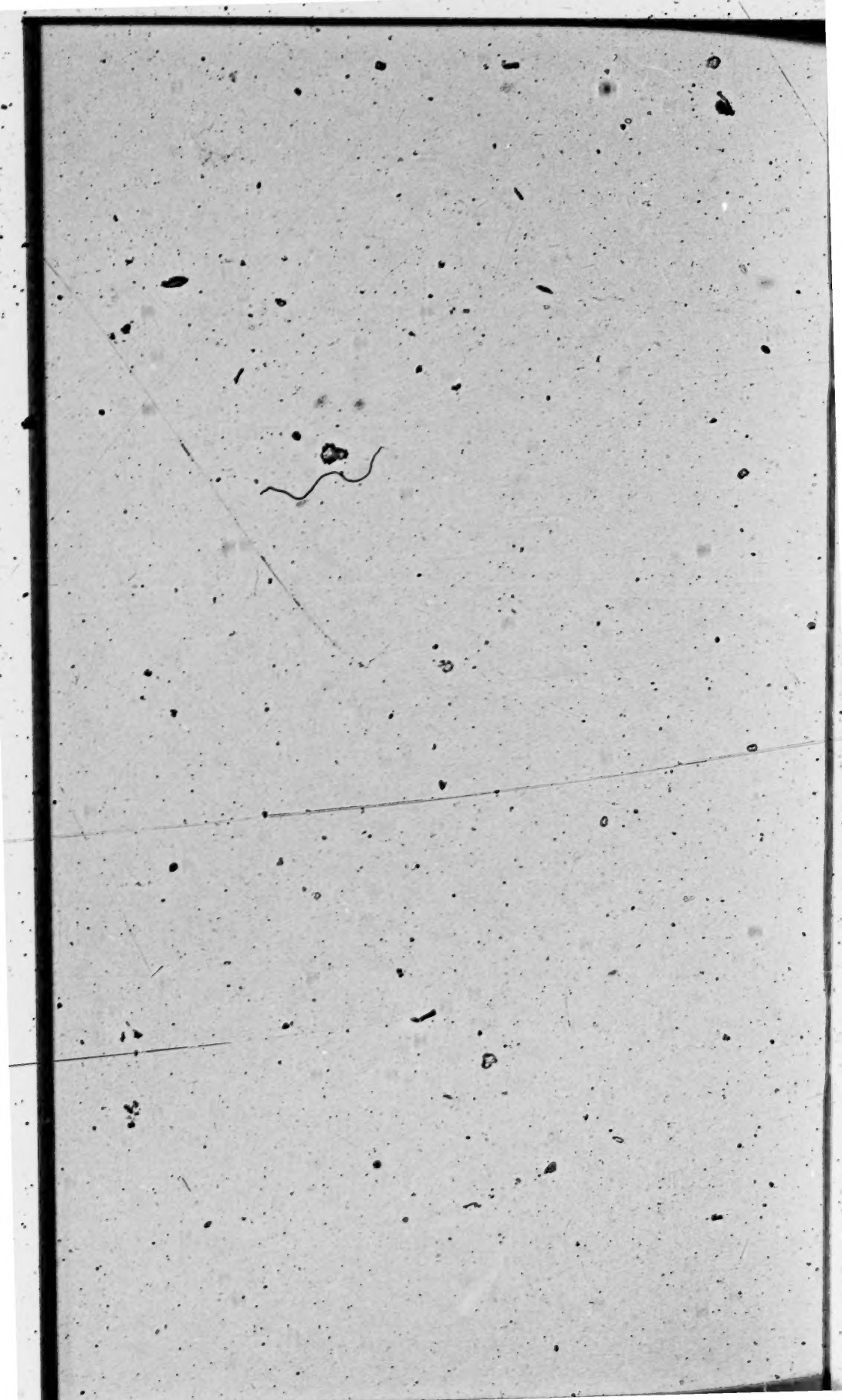


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DOCKET ENTRIES

	Proceedings
1969	
June 16	Complaint filed.
	Motion for Temporary Restraining Order, filed.
	Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order, filed.
	Brief in Support of Complaint of the Plaintiff's filed.
	Notice of Motion in Accordance with Rule 65(a) of FRCP, filed.
17	Motion to amend complaint, filed. Appearance of Ruth Abrams, Esq., filed.
17	Amended complaint, filed. Appearance of Theodore A. Glynn, Jr., Esq., filed.
17	JULIAN, D.J. Motion to amend complaint, granted.
19	ALDRICH, Ch.J. Court of Appeals, JULIAN, D.J. & PETTINE, D. J. Hearing regarding issuance of Preliminary Injunction . . . Arguments by counsel . . . Advisement.
23	Motion to File and Amendment to Amended Complaint; and to File a Supplementary Brief, filed.
24	ALDRICH, CIRCUIT JUDGE, JULIAN, D. J., & PETTINE, D. J. Ruling on Plaintiff's Application for a Preliminary Injunction. . . . We shall issue a temporary injunction restraining the prosecution of the state court proceedings pending further order of this court other than for the purpose of considering and deciding pending or new

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motions to dismiss, and pending or new motions to suppress evidence. Copies given in hand to Atty Theodore Glynn, Jr., Ruth Abrahms, and Atty Herbert Swartz on June 24, 969. (filed on June 24, 1969 at 1:03 PM)

24 ALDRICH, CIRCUIT JUDGE, JULIAN, D. J., & PETTINE, D. J., TEMPORARY INJUNCTION. . . . District Attorney . . . is restrained from prosecuting the indictments pending against plaintiffs deciding pending or new motions to dismiss, and . . . other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence. Copies given in hand to Att. Theodore Glynn, Jr., Ruth Abrahms, and Atty Herbert Swartz on June 24, 1969. (filed on June 24, 1969 at 1.03 PM)

24 ALDRICH, CIRCUIT JUDGE, The Honorable Bailey Aldrich, Chief Judge, United States Court of Appeals for the First Circuit, and the Honorable Raymond J. Pettine, United States District Judge for the District of Rhode Island, to sit with the Honorable Anthony Julian, United States District Judge for the District of Massachusetts, in the three-judge court as required by 28 U.S.C. 2281.

30 Plaintiffs' motion to file an amendment to amended complaint—II (following dismissal of original indictments in Suffolk Superior Court), filed.

30 Amendment to amended complaint—II, filed. Copies mailed to Hon. Bailey Aldrich and Hon. Raymond J. Pettine.

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July 9 Brief of the Plaintiff following the second set of indictments, filed. Copies to Three Judges.

11 Addendum to the brief of the plaintiff following issuance of the second set of indictments, filed. Copies to Honorable Bailey Aldrich, Anthony Julian, and Raymond J. Pettine mailed.

14 Motion of Grove Press, Inc. to intervene as a plaintiff, filed with Intervenor's Complaint attached thereto.

14 Appearance of Alan Dershowitz, Esq., for intervenor, filed.

14 ALDRICH, CH. Cir Judge, JULIAN, J. & PETTINE, J. Hearing on Motion to amend complaint. Arguments. Advisement.

July 15 Aldrich, Cir. Judge, Julian, J. and Pettine, J. MEMORANDUM AND RULINGS ON MOTION TO FURTHER AMEND COMPLAINT, ON MOTION TO INTERVENE, AND ON MOTION FOR PRELIMINARY INJUNCTION, filed.
Copy mailed to Messrs. Swartz, Roberts, Dershowitz, Glynn, Jr. and Abrams.

July 29 Transcript of hearing of Monday, July 14, 1969, filed.

31 Letter to Clerk, dated July 30, 1969, from Herbert S. Swartz, Esq. re briefs.

Sept. 16 Letter to Clerk, dated Sept. 15, 1969, from Herbert S. Swartz, Esq., advising that as of this date no decision has as yet been rendered by Judge Tauro.

Nov. 5 Brief of amicus, Grove Press, Inc., filed. Copy to Judge Aldrich and Judge Pettine.

12 THREE JUDGE COURT—Hearing on restraining order; advisement. Rulings and Findings of Chief Justice Tauro, filed.

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14 Appearance of Lawrence P. Cohen, Asst Atty General, filed.

20 Defendant's motion for abstention, filed.

20 Memorandum in support of defendant's motion for abstention, filed

21 THREE JUDGE COURT—Hearing on motion for preliminary injunction; arguments; advisement.

28 ALDRICH, CH. J. OPINION filed . . . "the injunction will not issue for one week, to permit plaintiffs to add other parties, if so advised, and to give the defendant the opportunity to apply to the Circuit Justice for a stay."

28 JULIAN, J. DISSENTING OPINION filed . . . "In my opinion the position taken by the majority of this Court is legally unsound and inimical to the public interest. I must therefore dissent.

28 Copies of opinions delivered to counsel in hand.

Dec. 1 Appearance of Louis M. Nordlinger, Esq., for defendant, filed.

1 Motion of plaintiffs to add parties defendant, Robert Quinn, Attorney General, filed.

1 Motion of Grove Press, Inc. to enter as party plaintiff, filed.

2 Notice of appeal filed. Copies to Messrs. Swartz, Roberts & Dershowitz.

5 Consent and opposition to plaintiff's motion to add parties defendants, filed.

6 ALDRICH, CH. J. Order adding Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, as a party defendant, entered.

6 ALDRICH, CH. J. and PETTINE, D. J. INJUNCTION entered. Copies to counsel.

6 ALDRICH, CH. J. On motion of the defendants the temporary injunction pending a decision on

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the merits entered this day stayed pending defendants' request to the Supreme Court for a stay pending their appeal from the issuance of said injunction.

9 Appearance of Lawrence P. Cohen, Esq., for deft Robert H. Quinn, filed.

Dec. 10 Motion of plaintiffs to add Alan M. Brunner and Campus Cinema, Inc. as parties plaintiffs, filed.

11 Amended motion of the plaintiffs to add parties plaintiffs and party defendant, filed.

15 Opposition of defendants to motion of plaintiffs to add parties, filed.

16 Stenographic record of proceedings on Nov. 12, 1969, filed.

Stenographic record of proceedings on Nov. 21, 1969, filed.

24 Deft's supplemental notice of appeal filed. Copies to Messrs. Swartz, Roberts and Dershowitz.

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Jan. 7 Original pleadings in one volume sent to the Supreme Court by certified mail. (No. 170170)

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action 69-665-J

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC., ALL OF 252 HUNTINGTON AVENUE, BOSTON, MASSACHUSETTS,

PLAINTIFFS,

v.

GARRETT BYRNE, AS HE IS THE DULY ELECTED DISTRICT ATTORNEY FOR SUFFOLK COUNTY, CITY OF BOSTON, COMMONWEALTH OF MASSACHUSETTS,

SERVE: ASSISTANT DISTRICT ATTORNEY THEODORE GLYNN, JR. AGENT OF THE SUFFOLK COUNTY DISTRICT ATTORNEY, 21 EARLE ROAD, WELLESLEY, MASSACHUSETTS,

DEFENDANT.

COMPLAINT

(Permanent Injunction and Preliminary Injunction)

Plaintiffs, by their attorneys, allege as follows:

(1) Jurisdiction of this action is conferred upon this Court by Title 28 U.S.C. Sec. 1343, on the theory that this is a civil rights action under Title 42 U.S.C. Sec. 1983. The amount in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

(2) Film Distributors, Inc. is a Massachusetts corporation doing business under the trade name of Symphony Cinema I, a theatre located at 252 Huntington Avenue, in Boston. James Vlamos is a resident of the City of Boston and the President of both corporations. Symphony Cinema II, Inc. is a Massachusetts corporation doing business under the trade name of Symphony Cinema, II, a theatre located at 252 Huntington Avenue, in Boston. Serafim Karalexis is the theatre manager of both theatres, and an employee of both corporations.

(3) The defendant is the duly elected district attorney for Suffolk County in the Commonwealth of Massachusetts.

(4) On Wednesday morning, May 28, 1969, the plaintiffs commenced the exhibition of the motion picture known as "I Am Curious (Yellow)" at the theatres Symphony Cinema I and Symphony Cinema II in the City of Boston.

(5) On Thursday, May 29, 1969, the defendant did order his agents and servants in the Boston Police Department to make application for a search warrant for authority to seize the print of the motion picture "I Am Curious (Yellow)" playing at the aforementioned theatres. Such warrant was granted by the First Assistant Clerk of the Roxbury District Court of the City of Boston on Thursday, May 29, 1969, and on that afternoon, officers of the Boston Police Department did seize the print of the motion picture in the custody of the plaintiffs.

(6) A copy of the search warrant secured by Sergeant Edmund Griffin of the Boston Police Department, under color of authority granted in Sections 1, 2, 2A, 2B and 2C of Chapter 276 of the Massachusetts General Laws is attached hereto as Exhibit A. The warrant was in three parts — the warrant, the affidavit, and the report of Detective Garrett Flanagan as attached to the affidavit. This document in all three parts is attached as aforesaid.

(7) At no time prior to the seizure of the film was there any prior adversary proceeding to determine the alleged obscenity of the motion picture "I Am Curious (Yellow)."

(8) That on Tuesday morning, June 3, 1969, indictments were returned against all of the plaintiffs herein by the Suffolk County Grand Jury for alleged violation of Section 28A and Section 32 of Chapter 272 of the Massachusetts General Laws — to wit, possessing an obscene

motion picture and exhibiting an obscene motion picture, namely, the film "I Am Curious (Yellow)."

(9) Proceedings preliminary to trial in the Suffolk Superior Court commenced on the morning of Tuesday, June 11, 1969, in front of Superior Court Chief Justice Joseph Tauro. As of the date of this complaint, preliminary matters are still being heard before the said Judge Tauro.

(10) That on May 28, 1969, the Supreme Judicial Court of Massachusetts in the case of *Commonwealth* v. *State Amusement Corporation*, did declare that seizure of a motion picture could take place within the Commonwealth of Massachusetts by a police officer, after the police officer had made a report to a judge of a local district court. The Massachusetts Supreme Judicial Court held that this was "a procedure designed to focus searchingly on the question of obscenity." By implication, since there was no adversary proceeding prior to the seizure of the motion picture in the *State Amusement Corporation* case, the Supreme Judicial Court of Massachusetts has declared that a prior adversary proceeding before seizure of a motion picture is not necessary within the Commonwealth of Massachusetts. Case is attached hereto as Exhibit B.

(11) That for the case in which the plaintiffs are defendants in the Suffolk Superior Court, the said Judge Tauro is therefore bound by the decision of the Massachusetts Supreme Judicial Court that a prior adversary proceeding before seizure of a motion picture which is alleged to be obscene is not necessary.

(12) That the seizure of the motion picture "I Am Curious (Yellow)" by the defendant, his agents or servants, without a prior adversary proceeding as to its alleged obscenity, is a violation of the rights of the plaintiffs herein under the First, Fourth, and Fourteenth Amendments of the United States Constitution, and is of such a nature that

unless a permanent injunction is granted by this Court to enjoin the actions of the defendant so as to direct the defendant to return to the plaintiffs the print of the motion picture "I Am Curious (Yellow)" which was seized by the defendant, his agents or servants, and enjoining the defendant from any further seizure of any of the prints of the motion picture "I Am Curious (Yellow)," until such time as a prior adversary proceeding as to its alleged obscenity has been held in some appropriate court in the Commonwealth of Massachusetts, that your plaintiffs herein have and will continue to suffer irreparable harm and damage.

(13) That the plainitffs herein have been able to continue to exhibit the motion picture "I Am Curious (Yellow)" since May 30, 1969, because of the consideration and courtesy of the defendant in asserting that he would make no further seizures and prosecutions for the exhibition of this film, as a violation of Sections 28A and 32 as aforesaid. There is no judicial or statutory restraint upon the defendant from any further seizure and prosecution for exhibition of this film, should the defendant change his mind.

(14) That in *Commonwealth* v. *State Amusement Corporation*, the Massachusetts Supreme Judicial Court was asked to consider whether or not Section 32 is sufficiently definite given the constitutional standards for an obscenity prosecution as set forth by the United States Supreme Court in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), and *Redrup* v. *New York*, 386 U.S. 767 (1967). The Massachusetts Supreme Judicial Court did not answer this question. Nor has the Massachusetts Supreme Judicial Court ever supplied the standard of "knowing the work to be obscene" to Section 32.

WHEREFORE, plaintiffs pray:

(1) That a preliminary injunction and a permanent in-

junction be granted prohibiting the defendant, his agents or servants, from any further seizures of prints of the motion picture "I Am Curious (Yellow)" without a prior adversary proceeding in an appropriate court in Massachusetts as to the alleged obscenity of the motion picture.

(2) That the Court order the defendant to return to the plaintiffs herein the print of the motion picture "I Am Curious (Yellow)" seized by the defendant, his agents or servants, on Thursday, May 29, 1969; that the Court order the suppression of its evidence in the cases now pending against the plaintiffs herein in Suffolk Superior Court as aforesaid; both for the reason that there was no prior adversary proceeding before seizure of the print, which was then exhibited to the Grand Jury and the basis upon which indictments were returned.

(3) That this Court order a preliminary injunction, and following appropriate hearing, a permanent injunction, against the defendant, his agents or servants, from any further continuation of the prosecution of the plaintiffs herein as they are defendants in the case in Suffolk Superior Court, on the grounds of alleged violation of Section 32 of Chapter 272 of the Massachusetts General Laws until such time as the said Section 32 has been altered and amended to include the following:

(a) Requirement of "knowledge" on the part of the exhibitor of a particular work.

(b) Definition of Section 32 to the effect that no conduct is proscribed therein beyond what has now become the constitutional definition of the crime of obscenity.

(c) That provisions for an expedited trial on the merits of the question of obscenity, and expedited appeal if the trial court finds obscenity, a fixed time within which the trial must be held, a fixed time

within which a trial court must render its judgment in the event that the case is jury waived, a fixed time within which an Appellate Court must hear an appeal, and a fixed time within which the Appellate Court must render its judgment.

(d) Lacking the opportunity to implement this, the State must provide for provisions by which the work of art can continue to be exhibited, with the exhibitors free from further prosecution during such interim period.

(e) That no prosecution under this section can be commenced on the basis of First Amendment evidence which is seized without a prior adversary proceeding.

(4) That this Court order a preliminary injunction, and following appropriate hearing, a permanent injunction, against the defendant, his agents or servants, from any further continuation of the prosecution of the plaintiffs herein as they are defendants in the case in Suffolk Superior Court, on the grounds of alleged violation of Section 28A of Chapter 272 of the Massachusetts General Laws until such time as the said Section 28A has been altered and amended to include the following:

(a) That provisions for an expedited trial on the merits of the question of obscenity, an expedited appeal if the trial court finds obscenity, a fixed time within which the trial must be held, a fixed time within which a trial court must render its judgment in the event that the case is jury waiver, a fixed time within which an Appellate Court must hear an appeal, and a fixed time within which the Appellate Court must render its judgment.

(b) Lacking the opportunity to implement this, the State must provide for provisions by which the work of art can continue to be exhibited, with the exhibi-

tors free from further prosecution during such interim period.

(c) That no prosecution under this section may be commenced on the basis of First Amendment evidence which is seized without a prior adversary proceeding.

(5) Your plaintiffs further pray that an injunction issue restraining this prosecution of the motion picture "I Am Curious (Yellow)," or any further prosecution in this jurisdiction of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene." Plaintiffs contend and pray herein on the basis that any such prosecution is "without hope of success." As reasons for this plaintiffs offer:

(a) The decision of the United States Court of Appeals for the Second Circuit that this film is not obscene. *United States* v. *A Motion Picture Film Entitled "I Am Curious (Yellow)*," 285 F. Supp. 465 (1968).

(b) That for the trial of such case, it was admitted by the United States Department of Customs that the film does have "social value."

(c) That the film is now playing without prosecution in approximately 10 major, metropolitan centers throughout the country. See affidavit.

(d) That this film has received serious and praiseworthy review by newspapers, magazines, television stations and radio stations throughout the country. That it has been treated as a serious work of art in all of the communication outlets as aforesaid.

(e) That as per the affidavit attached to this complaint, more than 25 leading citizens of the Greater Boston community have personally expressed their willingness to the attorney for the plaintiffs herein to testify at any trial concerning the alleged obscenity of the motion picture, to the effect that the motion

picture is not obscene and does indeed have "social value." Affidavit is attached hereto.

(6) For such other and further relief as this Court shall deem essential or proper in accordance with equity and law.

PLAINTIFFS, Serafim Karalexis,
James Vlamos,
Symphony Cinema II, Inc.,
and Film Distributors, Inc.
By their Attorney,
HERBERT S. SWARTZ

[*Certificate of Service — Omitted*]

[Exhibits Omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

MOTION TO AMEND COMPLAINT

Plaintiffs move the Court for leave to amend their complaint by striking same except for the exhibits attached thereto and substituting therefor the complaint hereto attached and entitled AMENDED COMPLAINT.

Attorney for Plaintiffs,

HERBERT S. SWARTZ
1330 Beacon Street
Brookline, Massachusetts

[Certificate of Service — Omitted]

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[1] The indictments in Suffolk Superior Court against the plaintiffs are as follows: 42587 and 42588 against the two corporations; 42589 and 42590 against Vlamos as he is the President of both corporations; 42591 and 42592 against Karalexis. All six indictments are in violation of Sections 28A and 32, Chapter 272 of the Massachusetts General Laws.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

AMENDED COMPLAINT

(Permanent and Preliminary Injunction)

Plaintiffs, by their attorneys, alleged as follows:

(1) Jurisdiction of this action is conferred upon this Court by Title 28 U.S.C., Sec. 1343, on the theory that this is a civil rights action under Title 42 U.S.C., Sec. 1983. The amount in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

(2) Film Distributors, Inc. is a Massachusetts corporation doing business under the trade name of Symphony Cinema I, a theatre located at 252 Huntington Avenue, in Boston. James Vlamos is a resident of the City of Boston and the President of both corporations. Symphony Cinema II, Inc. is a Massachusetts corporation doing business under the trade name of Symphony Cinema II, a theatre located at 252 Huntington Avenue, in Boston. Serafim Karalexis is the theatre manager of both theatres, and an employee of both corporations.

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(5) On Thursday, May 29, 1969, the defendant did order his agents and servants in the Boston Police Department to make application for a search warrant for authority to seize the print of the motion picture "I Am Curious (Yellow)" playing at the aforementioned theatres. Such warrant was granted by the First Assistant Clerk of the Roxbury District Court of the City of Boston on Thurs-

day, May 29, 1969, and on that afternoon, officers of the Boston Police Department did seize the print of the motion picture in the custody of the plaintiffs.

(6) A copy of the search warrant secured by Sergeant Edmund Griffin of the Boston Police Department, under color of authority granted in Sections 1, 2, 2A, 2B and 2C of Chapter 276 of the Massachusetts General Laws is attached hereto as Exhibit A. The warrant was in three parts — the warrant, the affidavit, and the report of Detective Garrett Flanagan as attached to the affidavit. This document in all three parts is attached as aforesaid.

(7) At no time prior to the seizure of the film was there any prior adversary proceeding to determine the alleged obscenity of the motion picture "I Am Curious (Yellow)."

(8) That on Tuesday morning, June 3, 1969, indictments were returned against all of the plaintiffs herein by the Suffolk County Grand Jury for alleged violation of Section 28A and Section 32 of Chapter 272 of the Massachusetts General Laws — to wit, possessing an obscene motion picture and exhibiting an obscene motion picture, namely, the film "I Am Curious (Yellow)."

(9) Proceedings preliminary to trial in the Suffolk Superior Court commenced on the morning of Tuesday, June 11, 1969, in front of Superior Court Chief Justice Joseph Tauro. As of the date of this complaint, preliminary matters are still being heard before the said Judge Tauro.

(10) That on May 28, 1969, the Supreme Judicial Court of Massachusetts in the case of *Commonwealth* v. *State Amusement Corporation*, did declare that seizure of a motion picture could take place within the Commonwealth of Massachusetts by a police officer, after the police officer had made a report to a judge of a local district court. The Massachusetts Supreme Judicial Court held that this was "a procedure designed to focus searchingly on the question of obscenity." By implication, since there was no adver-

sary proceeding prior to the seizure of the motion picture in the *State Amusement Corporation* case, the Supreme Judicial Court of Massachusetts has declared that a prior adversary proceeding before seizure of a motion picture is not necessary within the Commonwealth of Massachusetts. Case is attached hereto as Exhibit B.

(11) That for the case in which the plaintiffs are defendants in the Suffolk Superior Court, the said Judge Tauro is therefore bound by the decision of the Massachusetts Supreme Judicial Court that a prior adversary proceeding before seizure of a motion picture which is alleged to be obscene is not necessary.

(12) That the seizure of the motion picture "I Am Curious (Yellow)" by the defendant, his agents or servants, without a prior adversary proceeding as to its alleged obscenity, is a violation of the rights of the plaintiffs herein under the First, Fourth, and Fourteenth Amendments of the United States Constitution, and is of such a nature that unless a permanent injunction is granted by this Court to enjoin the actions of the defendant so as to direct the defendant to return to the plaintiffs the print of the motion picture "I Am Curious (Yellow)" which was seized by the defendant, his agents or servants, and enjoining the defendant from any further seizure of any of the prints of the motion picture "I Am Curious (Yellow)," until such time as a prior adversary proceeding as to its alleged obscenity has been held in some appropriate court in the Commonwealth of Massachusetts, that your plaintiffs herein have and will continue to suffer irreparable harm and damage.

(13) That the plaintiffs herein have been able to continue to exhibit the motion picture "I Am Curious (Yellow)" since May 30, 1969, because of the consideration and courtesy of the defendant in asserting that he would make no further seizures and prosecutions for the exhibition of

this film, as a violation of Sections 28A and 32 as aforesaid. There is no judicial or statutory restraint upon the defendant from any further seizure and prosecution for exhibition of this film, should the defendant change his mind.

(14) That in *Commonwealth v. State Amusement Corporation*, the Massachusetts Supreme Judicial Court was asked to consider whether or not Section 32 is sufficiently definite given the constitutional standards for an obscenity prosecution as set forth by the United States Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), and *Redrup v. New York*, 386 U.S. 767 (1967). The Massachusetts Supreme Judicial Court did not answer this question. Nor has the Massachusetts Supreme Judicial Court ever supplied the standard of "knowing the work to be obscene" to Section 32.

(15) Section 32 of Massachusetts General Laws, Chapter 272

(a) Contains no requirement that an alleged violator "know the work to be obscene."

(b) Section 32 proscribes conduct which is beyond the constitutional definition of the crime of obscenity.

(c) There are no provisions in Section 32 for an expedited trial on the merits of the question of obscenity, and expedited appeal if the trial court finds obscenity, a fixed time within which a trial must be held, a fixed time within which a trial court must render its judgment in the event that the case is jury waived, a fixed time within which an Appellate Court must hear an appeal, nor a fixed time within which the Appellate Court must render its judgment.

(d) There is no provision in Section 32 that if any prosecution is commenced under this section on the basis of First Amendment evidence, such evidence cannot be seized without a prior adversary proceeding.

(e) There is no provision in Section 32 by which the

work of art can continue to be exhibited, with the exhibitor free from further prosecution during such interim period, until such time as there is a final adjudication of the alleged obscenity.

Said Section 32 of Massachusetts General Laws, Chapter 272 is unconstitutional.

(16) Section 28A of Massachusetts General Laws, Chapter 272

(a) There are no provisions in Section 28A for an expedited trial on the merits of the question of obscenity, and expedited appeal if the trial court finds obscenity, a fixed time within which a trial must be held, a fixed time within which a trial court must render its judgment in the event that the case is jury waived, a fixed time within which an Appellate Court must hear an appeal, nor a fixed time within which the Appellate Court must render its judgment.

(b) There is no provision in Section 28A that if any prosecution is commenced under this Section on the basis of First Amendment evidence, such evidence cannot be seized without a prior adversary proceeding.

(c) There is not provision in Section 28A by which the work of art can continue to be exhibited, with the exhibitor free from further prosecution during such interim period, until such time as there is a final adjudication of the alleged obscenity.

Said Section 28A of Massachusetts General Laws, Chapter 272 is unconstitutional.

WHEREFORE, plaintiffs pray:

(1) That a preliminary injunction and a permanent injunction be granted prohibiting the defendant, his agents or servants, from any further seizures of prints of the motion picture "I Am Curious (Yellow)" without a prior adversary proceeding in an appropriate court in Massachusetts as to the alleged obscenity of the motion picture.

(2) That the Court order the defendant to return to the plaintiffs herein the print of the motion picture "I Am Curious (Yellow)" seized by the defendant, his agents or servants, on Thursday, May 29, 1969; that the Court order the suppression of its evidence in the cases now pending against the plaintiffs herein in Suffolk Superior Court as aforesaid; both for the reason that there was no prior adversary proceeding before seizure of the print, which was then exhibited to the Grand Jury and the basis upon which indictments were returned.

(3) That this Court order a preliminary injunction, and that following appropriate hearing, a permanent injunction, against the defendant, his agents or servants, from any further continuation of the prosecution of the plaintiffs herein in the said six actions now pending in the Suffolk Superior Court (Docket numbers 42587, through 42592) until such time as the said Sections 32 and 28A of Massachusetts General Laws, Chapter 272, have been appropiately altered and amended.

(4) Your plaintiffs further pray that an injunction issue restraining this prosecution of the motion picture "I Am Curious (Yellow)," or any further prosecution in this jurisdiction of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene." Plaintiffs contend any pray herein on the basis that any such prosecution is "without hope of success." As reasons for this plaintiffs offer:

(a) The decision of the United States Court of Appeals for the Second Circuit that this film is not obscene. *United States* v. *A Motion Picture Film Entitled "I Am Curious (Yellow)."* 285 F. Supp. 465 (1968).

(b) That for the trial of such case, it was admitted by the United States Department of Customs that the film does have "social value."

(c) That the film is now playing without prosecu-

tion in approximately 10 major, metropolitan centers throughout the country. See affidavit.

(d) That this film has received serious and praiseworthy reviews by newspapers, magazines, television stations and radio stations throughout the country. That it has been treated as a serious work of art in all communications outlets as aforesaid.

(e) That as per the affidavit attached to this complaint, more than 25 leading citizens of the Greater Boston community have personally expressed their willingness to the attorney for the plaintiffs herein to testify at any trial concerning the alleged obscenity of the motion picture, to the effect that the motion picture is not obscene and does indeed have "social value." Affidavit is attached hereto.

(5) For such other and further relief as this Court shall deem essential or proper in accordance with equity and law.

PLAINTIFFS, SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC.

By their Attorney,

(s) HERBERT S. SWARTZ

HERBERT S. SWARTZ

---

1 The indictments in Suffolk Superior Court against the plaintiffs are as follows: 42587, and 42588 against the two corporations, 42589 and 42590 against Vlamos as he is the President of both corporations; 42591 and 42592 against Karalexis. All six indictments are in violation of Sections 28A and 32, Chapter 272 of the Massachusetts General Laws.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*, and JULIAN and PETTINE, *District Judges*

TEMPORARY INJUNCTION
June 24, 1969

After due notice and hearing, and pursuant to this Court's ruling filed this day on the plaintiffs' application for a temporary injunction, it is hereby ordered that pending further order of this Court the defendant, Garrett Byrne, as he is the District Attorney for the County of Suffolk, Commonwealth of Massachusetts, be and he is hereby restrained from prosecuting the indictments pending against the plaintiffs herein in the Superior Court in and for said County, being criminal cases numbered 42587 through 42592, other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*, and JULIAN and PETTINE, *District Judges*

RULING ON PLAINTIFFS' APPLICATION
FOR A PRELIMINARY INJUNCTION
June 24, 1969

In this three-judge court case plaintiffs seek a declaration that Mass. Gen. Laws c. 272, §§ 28A and 32, are un-

constitutional. Although the allegations are not that simple, plaintiffs may be said to allege two basic grounds. The first is that their moving picture, "I Am Curious (Yellow)," was seized without an adversary preliminary hearing in alleged violation of their First Amendment rights. Neither statute makes any provision covering this matter. The seizure was affected as a result of a search warrant issued on the basis of an affidavit. We do not recognize, nor are we asked to recognize, *in limine* jurisdiction to vacate improperly issued search warrants, if this one be assumed to be such. The statutes are not unconstitutional merely because the prosecution conducted, if it did, an improper search for evidence.

Secondly, sections 28A and 32 may appear to be unconstitutional on their face in that they make criminal the publication of obscene matter in the absence of knowledge of the content of the publication. *Cf. Smith* v. *California*, 1959, 361 U.S. 147. The Massachusetts court has construed section 28A, however, implicitly to require proof of scienter. *Demetropolis* v. *Commonwealth*, 1961, 342 Mass. 658. The court has not passed upon section 32 in this respect.

It was stated in open court that the indictments pending against plaintiffs in the state Superior Court do not contain an allegation of defendants' knowledge of the content of the picture. If the statute impliedly contains such a requirement we would suppose that it should be alleged, for in the absence of such allegation the grand jury might have indicted without finding probable cause as to that element of the offense.

A federal court should be slow to declare a state statute unconstitutional when there be doubt as to an unconstitutional meaning. Particularly should this be true when the state court has, through a past ruling, indicated that it might give the statute an interpretation which made it constitutional. Whatever may be the limits of 28 U.S.C. § 2283, plaintiffs have here full opportunity to obtain a ruling

from the state court. By motions to dismiss the indictments on the ground of failure to allege scienter, the filing of which we will assume the state court would permit, plaintiffs may seek a construction of the statute. If the court construes the statute in plaintiffs' favor, presumably it will dismiss the indictments. If it construes it as not requiring scienter and denies the motions to dismiss, then we will be free to hold the statute unconstitutional for lack of an essential element, should we so determine, and grant the relief sought herein.

Under the circumstances we shall issue a temporary injunction restraining the prosecution of the state court proceedings pending further order of this court other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

MOTION TO FILE AN AMENDMENT TO AMENDED COMPLAINT; AND TO FILE A SUPPLEMENTARY BRIEF

Plaintiffs move the Court for leave to file an amendment to their amended complaint, said amendment attached hereto and titled AMENDMENT TO AMEND COMPLAINT; and for leave to file a supplementary brief, which is attached hereto.

Attorney for Plaintiffs,
HERBERT S. SWARTZ
1330 Beacon Street
Brookline, Massachusetts

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

AMENDMENT TO AMENDED COMPLAINT

Now come the plaintiffs in the above matter and hereby move that Prayer (5) on Page 8 of their Amended Complaint be deleted and a new Prayer (5) be inserted in its place as follows:

(5) That this Court declare and say that Sections 28A and 32 of Chapter 272 of the Massachusetts General Laws are unconstitutional on their face, and unconstitutional in their application to the plaintiffs herein, all in accordance with Title 28, U.S.C. Section 2201.

That a new Prayer (6), (the previous Prayer (5)), be added to the Amended Complaint as follows:

(6) For such other and further relief as this Court shall deem essential or proper in accordance with equity and law.

PLAINTIFFS, SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC.
By their Attorney,
HERBERT S. SWARTZ

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

MOTION TO FILE AN AMENDMENT TO AMENDED COMPLAINT — II (FOLLOWING DISMISSAL OF ORIGINAL INDICTMENTS IN SUFFOLK SUPERIOR COURT)

Plaintiffs move the Court for leave to file a further amendment to their amended complaint, said amendment attached hereto and titled AMENDMENT TO AMENDED COMPLAINT — II (Following Dismissal of Original Indictments In Suffolk Superior Court).

Attorney for Plaintiffs,
HERBERT S. SWARTZ
1330 Beacon Street
Brookline, Massachusetts

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

AMENDMENT TO AMENDED COMPLAINT — II (Following Dismissal of Original Indictments in Suffolk Superior Court)

Now come the plaintiffs in the above matter and hereby move that the following allegations be added to Page 6 of their Amended Complaint, as follows:

(17) Following hearing of this case before a three-

judge court, the said three-judge court on Tuesday, June 24, 1969, did issue a temporary restraining order against the pending state indictments as aforesaid.

(13) The attorney for the plaintiffs herein, the defendants in Suffolk Superior Court, did make a motion in Suffolk Superior Court before Judge Tauro on Wednesday morning, June 25, 1969, to have the pending indictments dismissed. This motion was assented to by the Commonwealth and said indictments have now been dismissed, being all of the indictments set forth as aforesaid in this Complaint.

(19) That request has now been made to the attorney for the plaintiffs herein by the Office of the Suffolk County District Attorney that the said attorney make available to the Office of the Suffolk County District Attorney one print of the motion picture "I Am Curious (Yellow)." This print will be used for any further investigations to be made by the Office of the Suffolk County District Attorney, and for further use if necessary if presentation is made to the Grand Jury sitting for and of the County of Suffolk for the return of indictments against your plaintiffs herein, similar to the original indictments for which this Complaint was brought. The attorney for the plaintiffs herein has made available to the Office of the Suffolk County District Attorney one print of the motion picture "I Am Curious (Yellow)," and in furtherance of the request made by the Office of the Suffolk County District Attorney this print may be used for whatever purposes are necessary at trial of the plaintiffs herein, if indictments are returned against them in Suffolk County by the Grand Jury.

(20) On information and belief, the plaintiffs herein say that they do anticipate that further indictments will be sought against them by the Office of the Suffolk County District Attorney for alleged violations of Section 28A of Chapter 272 of the Massachusetts General Laws. That pro-

secution for an offense under Section 28A would require that the defendants "know the work to be obscene." *Demetropolos* v. *Commonwealth*, 342 Mass. 658 (1961).

(21) That in reliance upon *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), the Massachusetts Supreme Judicial Court still follows the criteria set up in that case for the constitutional definition of obscenity — (1) That the dominant theme of the work appeals to a prurient interest in sex; (2) That the work is patently offensive to contemporary community standards of sexual representation or description; and (3) That the work is utterly without social value. See *Commonwealth* v. *State Amusement Corporation*, Paragraph 10 of the Amended Complaint, *supra*.

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II

The plaintiffs in the above matter further and hereby move this Honorable Court to amend their Complaints by deleting Prayers (5) and (6), originally on Page 8 of their Amended Complaint, as added to it by the Amendment to the Amended Complaint, and that following deletion of said Prayers (5) and (6), the following prayers be added in their place as follows:

(5) That this Court declare and say that Section 28A of Chapter 272 of the Massachusetts General Laws is unconstitutional of its face, and unconstitutional in its application to the plaintiffs herein, all in accordance with Title 28 U.S.C., Section 2201.

(6) That this Court declare and say that the motion picture "I Am Curious (Yellow)" is not obscene within the constitutional definition of obscenity as set forth by the United States Supreme Court in *Redrup* v. *New York*, 386 U.S. 767 (1967). See also *Books, Inc.* v. *United States*, 385 F. 2d 935 (1 Cir. 1966), rev'd 388 U.S. 449 (1967).

(7) That this Court restrain any future prosecutions of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene" within the terms of

Section 28A of Chapter 272, for the reason that there is no way that any future defendant in such prosecution could "know the work to be obscene."

(8) That any further prosecutions of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene" and therefore violative of Section 28A of Chapter 272 of Massachusetts' General Laws be restrained until such time as the Massachusetts courts affirm that the standards for finding a work obscene within the constitutional definition of obscenity as set forth in *Redrup* v. *New York, supra,* are that — (1) That the work was being shown to those under the age of 18; (2) Or that the work was an invasion of privacy; or (3) That the work was being advertised in a "pandering" manner.

(9) That this Court issue an injunction restraining any further prosecutions of the plaintiffs herein for the showing of the motion picture "I Am Curious (Yellow)" on the grounds that any prosecution is "without hope of success," in that given the decision of the Second Circuit, no prosecution could hope to prove that this film is "utterly without social value" or that if is "patently offensive to contemporary community standards of sexual representation or description," interpreting the word "community" as implying a *national* standard. See *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Manual Enterprises* v. *Day,* 379 U.S. 478 (1962); and *In re Gianini,* 72 Cal. Rptr. 655 (1968).

(10) For such other and further relief as this Court shall deem essential or proper in accordance with Equity and Law.

PLAINTIFFS, SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC.
By their Attorney,
HERBERT S. SWARTZ

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*, and JULIAN and PETTINE, *District Judges*

MEMORANDUM AND RULINGS ON MOTION TO FURTHER AMEND COMPLAINT, ON MOTION TO INTERVENE, AND ON MOTION FOR PRELIMINARY INJUNCTION

July 15, 1969

The motion to further amend the complaint is allowed.

The motion for leave to intervene is denied. (Proposed intervenor may file an amicus brief at such times as briefs may be appropriate.)

The motion for a temporary injunction is denied at this time, subject to renewal if and when petitioner is convicted in the Superior Court. If petitioner is convicted and the prosecution offers to renew the present stipulation, that no seizure of film or interruption with the showing be made, the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against the petitioner, or for 30 days after verdict, whichever shall first occur.

Although the court has allowed the motion to further amend, it will not consider now or at any time the claim that petitioner's film is not obscene, as an evidentiary matter. The court may consider ruling on the question whether the statute is unconstitutional on its face, or whether it is unconstitutional to prosecute an obscene publication not conspicuously or pruriently advertised and not available to minors.

The court presently invites briefs on the following questions:

has been given, 28 U.S.C. § 2284, and an assistant attorney general has conducted the defense throughout. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against prosecution thereunder. Because of the fact that the original indictments were defective, the proceedings sought to be enjoined postdate the assumption of jurisdiction by this court, and no question arises under 28 U.S.C. § 2283, the anti-injunction, or what is sometimes called the comity, statute.

Defendant's broad motion to dismiss tests the substance of plaintiffs' case. Our present question, however, is only whether we shall issue a temporary injunction pending final disposition, there being possible reasons to withhold the making of a final decision, which we have not yet fully explored. Alternatively, there is the question whether we should abstain altogether, without granting temporary relief. With respect to the first question, the issues, of couse, are whether there is a probability that plaintiffs will ultimately prevail, *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 1 Cir., 1968, 390 F.2d 113, *cert. denied* 391 U.S. 914, and the adequacy of the remedy at law.

The following facts appear by stipulation of counsel or otherwise. Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg* v. *United States*, 1966, 383 U.S. 463. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

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which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballard, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . . ."

For purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts courts.[3] In this connection we note that the Superior Court of Massachusetts, in the recent case of *Commonwealth* v. *Karalexis*, has found that "the dominant theme of the film ... is its appeal to prurient interest in sex .... [The film] is patently offensive to the average person and an affront to community standards ... [It] is utterly without redeeming social value." Except insofar as it found statements in the opinion favorable to its conclusions in other respects, the Superior Court disposed of *Stanley* v. *Georgia* by stating it to be "irrelevant."

In *Stanley* Mr. Justice Marshall wrote the opinion of the Court in which four others joined. Mr. Justice Black concurred in the result because, in his mind, no case-by-case reasoning is needed in the area of obscenity; all is permissible.[4] The remaining three justices concurred on Fourth Amendments grounds,[5] stating that the obscenity question should not have been reached. The Court held that

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[3] Another court, viewing this same film, has differed. *United States* v. *"I Am Curious (Yellow),"* 2 Cir., 1968, 404 F.2d 196.

[4] The Superior Court's extensive analysis in *Karalexis* of a decade of the Supreme Court's views, reaching the conclusion that there is no majority agreement on any one approach to obscenity apart from the fact that it disregards such an agreement in *Stanley*, overlooks the fact that if only four, or even three justices agree on one method by which immunity is reached, this agreement is as significant as if five joined, so long as there are enough other justices who can be counted on to concur in the result. If we may be pardoned the analogy, if deuces are wild, an inside straight flush and a deuce takes the pot.

[5] Not the Fourth Amendment grounds on which the defendants assert the majority opinion rests. The three concurring justices regarded the warrant under which Stanley's home had been searched insufficient to justify the seizure of the film. The opinion of the Court, pointedly, it may be thought, ignored that issue. The present defendant's claim that, nevertheless; the Court looked to a Fourth Amendment general protection of privacy, is made in the face of the fact that the Court spoke constantly in terms of the First and Fourteenth Amendments and did not mention the Fourth.

If an adult individual may view obscene material in the privacy of his home,

a) can he purchase obscene material for such purpose?
b) can he invite friends to the viewing?
c) can he go to a private place to view such material?
d) can a group of persons go to such private place?
e) can they go to an adequately controlled public place?

(s) BAILEY ALDRICH
BAILEY ALDRICH
(s) ANTHONY JULIAN
ANTHONY JULIAN
(s) RAYMOND J. PETTINE
RAYMOND J. PETTINE
B.A.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

MOTION FOR ABSTENTION

Now comes the defendant in the above entitled action and, by his attorney, moves this Honorable Court to abstain from granting the relief sought in the Complaint filed herein, or otherwise passing upon the issues raised in the Complaint, pending resolution of those issues by the courts of the Commonwealth of Massachusetts.

Respectfully submitted,
ROBERT H. QUINN,
Attorney General.
LAWRENCE P. COHEN,
Deputy Assistant
Attorney General.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*,
JULIAN and PETTINE, *District Judges*.

OPINION

November 28, 1969

ALDRICH, *Circuit Judge*. This is a three-judge district court action in which a frontal attack is made upon a state obscenity statute, based upon the Court's recent decision in *Stanley* v. *Georgia*, 1969, 394 U.S. 557. In that case the Court reversed a state conviction for possession of a concededly obscene moving picture film, found in the home of the defendant. We are asked to rule that this decision extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

Briefly, the facts are these. Plaintiffs Karalexis et al. are the owners and operators of a moving picture theatre which has been engaged in showing a film, owned and leased by Grove Press, Inc.,[1] entitled "I Am Curious (Yellow)." The named defendant is the county district attorney who has charged plaintiffs with violation of Mass. G.L. c. 272 § 28A[2] as a result of their exhibiting the film, but notice

[1] Grove Press, Inc.'s motion to intervene was originally denied, counsel being permitted, instead, to appear as an amicus. In view of this opinion, Grove Press may be allowed to renew its motion at an early date.

[2] "§ 28A. Importing, printing, distributing or possessing obscene things

Whoever imports, prints, publishes, sells or distributes a pamphlet, ballard, printed paper, phonographic record, or other thing

in certain circumstances possession of a moving picture film is constitutionally protected even though by contemporary standards the film is obscene. We do not consider this irrelevant.

The question is, how far does *Stanley* go. Is the decision to be limited to the precise problem of "mere private possession of obscene material," 394 U.S. at 561; is it the high water mark of a past flood, or is it the precoursor of a new one? Defendant points to the fact that the Court in *Stanley* stated that *Roth* v. *United States*, 1957, 354 U.S. 476, was "not impaired by today's holding," and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. at 485,[6] whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was "devoid of any ideological content" was irrelevant. 394 U.S. at 566.

Of greater importance, a need for affirmative proof that obscenity raises a "clear and present danger of antisocial conduct or will probably induce its recipients to such conduct," rejected in *Roth*, was stated in *Stanley* to have been rejected in the area of "public distribution." The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful.[7] 394 U.S. at 567. Had the Court considered obscenity harmful as such, the

[6] "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484.

[7] Non constant that a film which went beyond ordinary obscenity by exhorting sexual misconduct might be prohibited. Exhortation is not suggested in the case at bar.

fact that the defendant possessed it privately in his home would have been of no consequence.

In recognizing that public distribution differed from private consumption, the Court in *Stanley* gave two examples. In the case of public distribution, "obscene material might fall into the hands of children. . . . or . . . it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with *Stanley*, "No such dangers are present in this case."

We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view osbcene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier.[8] A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. *Cf. Griswald* v. *Conneticut*, 1965, 381 U.S. 479. If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.[9]

So much for the probability of success. We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with

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[8] It may be suggested that the supplier would run a particular risk, since the apprehended possessor of the film would, under *Stanley*, have no Fifth Amendment privilege to resist inquiry.

[9] For a further discussion of *Stanley* v. *Georgia*, *see* The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 147-154 (1969).

plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset.[10] It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. *See Dombrowski v. Pfister*, 1965, 380 U.S. 479, 486-89.

This leads us to defendant's contention that we should, nevertheless, abstain until the Massachusetts Supreme Judicial Court has considered this question, since plaintiffs can raise it in their appeal from their Superior Court convictions. However, if our interpretation of *Stanley* is correct, we find it difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness. Hence we must regard abstention as improper. *Zwickler v. Koota*, 1967, 389 U.S. 241. In the field where Congress has established a three-judge district court, abstention may still be warranted if there is a reasonable likelihood that the state court may construe its statute so as to avoid constitutional issues, but abstention is not appropriate simply to allow the state court to be the one to decide the statute's basic conflict with the federal constitution.[11]

We do understand, however, certain apprehensions voiced by the defendant. We note, accordingly, that this is a decision of probability, not a final holding that the Massachusetts statute is unconstitutional. Much less is it a decision

[10] The fact that plaintiffs are economically motivated is of no significance. *New York Times v. Sullivan*, 1964, 376 U.S. 254. In *Interstate Circuit, Inc. v. Dallas*, 1968, 390 U.S. 676 at 684, the Court spoke disapprovingly of the effect of the Dallas ordinance upon "one who wishes to convey his ideas through that medium [films], which of course includes one who is interested not so much in expression as in making money. . . ."

[11] There is an alternative possibility, that the Supreme Judicial Court would find the film not obscene. The Superior Court, in an elaborate opinion, has found otherwise. We are not moved by the thought that we should postpone permitting plaintiffs to exhibit their film on the ground that, after all, it is *not* obscene.

that one who distributes to children, or who creates a clear public nuisance, has standing to raise the contention that the statute is overbroad.[12] The preliminary injunction presently to issue will be restricted to, and conditioned upon, plaintiffs' adherence to the restrictions described earlier in this opinion. Nor do we consider the difference between the right to regulate conduct as distinguished from expression. *Cf. Derrington* v. *City of Portland, Or.* 2/26/69, *cert. denied* 38 L.W. 3170. Finally, we voice no opinion as to the legal consequences if plaintiffs exhibit their film under the protection of our injunction, and it is ultimately determined that our view was mistaken and that such exhibition was properly considered illicit.

Because of the importance of the matter, the injunction will not issue for one week, to permit plaintiffs to add other parties, if so advised, and to give the defendant the opportunity to apply to the Circuit Justice for a stay.

(s) BAILEY ALDRICH
BAILEY ALDRICH
U.S. Circuit Judge

(s) RAYMOND J. PETTINE
RAYMOND J. PETTINE
U.S. District Judge

[12] Normally standing is granted only when a defendant's own conduct is constitutionally protected. *United States* v. *Raines*, 1960, 362 U.S. 17. This rule has been relaxed in cases dealing with statutes affecting free expression. *See United States* v. *Raines*, *supra*, at 22 (dictum); *Thornhill* v. *Alabama*, 1940, 310 U.S. 88, 96-98; Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962). However, even where free speech is involved, it may be that standing should not be granted unless the defendant's conduct is at least *arguably* constitutionally privileged. *Cf. Brown* v. *Louisiana*; 1966, 383 U.S. 131, 143, 147-48 (concurring opinion of Mr. Justice Brennan); *Dennis* v. *United States*, 341 U.S. 494, 515-17. We do not reach such questions.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*
JULIAN and PETTINE, *District Judges*

DISSENTING OPINION

November 28, 1969

JULIAN, J. (dissenting)

I do not agree with the majority. The constitutionality of the Massachusetts criminal obscenity statute[1] is presently being litigated in the Massachusetts Courts. Pending final adjudication by the Supreme Judicial Court of the plaintiffs' appeal from their conviction in the Superior Court for violating that statute, this Court should abstain from taking further action in this case and should not interfere with the enforcement of the statute by the Commonwealth by enjoining its public officials from prosecuting the plaintiffs for additional violations of the statute should they persist in exhibiting the film while their conviction still stands.

It is my understanding that for the purpose of deciding the questions presently before us the Court assumes that the film involved in this litigation is in fact obscene within the meaning of the law. In fact, no evidence has been taken and no finding made on this issue by this Court. The Superior Court has found the film to be obscene.

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[1] Mass. G.L. c. 272, § 28A provides as follows:

"Whoever ... has in his possession ... any obscene ... print, picture, figure, image ... for the purpose of ... exhibition ... shall be punished ..."

The Massachusetts Court has construed this statute implicitly to require proof that the defendant *knowingly* has such material in his possession. *Demetropolos* v. *Commonwealth*, 1961, 342 Mass. 658.

The plaintiffs' reliance on *Stanley* v. *Georgia*, 394 U.S. 557 (1969), is untenable. The case before us is governed by *Roth* v. *United States*, 354 U.S. 476 (1957). The precise issue in *Roth* was the constitutionality under the First Amendment of two criminal obscenity statutes. One was a Federal statute (18 U.S.C. § 1461) which made it a crime for anyone to deposit for mailing and delivery obscene books, circulars or advertising. The other was a California statute (West's Ca. Penal Code Ann., 1955, § 311) which made it a crime for any person willfully and lewdly to keep for sale an obscene book or to publish an obscene advertisement of them. The Supreme Court held both statutes constitutional.

The Massachusetts statute before us is essentially the same as the two statutes upheld in *Roth* in that all three make the public distribution of obscene matter a criminal offense. This being so, it must follow as a matter of elementary logic that the Massachusetts statute is also constitutional.

The holding in *Roth* is still the law and is binding upon this Court. It has not been overruled by *Stanley* or any other case.

In *Stanley* the appellant was indicted, tried and convicted for "knowingly hav[ing] possession of ... obscene matter" in violation of a Georgia statute. The Georgia Supreme Court affirmed, holding it "not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was with 'intent to sell, expose or circulate the same.'" Appellant contended that the Georgia obscenity statute was unconstitutional insofar as it punishes mere private possession of obscene matter. The United States Supreme Court agreed and held that "the mere private possession of obscene matter cannot constitutionally be made a crime." The Supreme Court takes pains to distinguish the case before it from *Roth* and

similar cases in which *public commercial dissemination* of obscene material is involved.

The Court notes (p. 559) that the Georgia statute extended "further than the typical statute forbidding commercial sales of obscene material." It also notes (p. 559) that the "State and appellant both agree that the question here before us is 'whether a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter' is constitutional." The Court points out (pp. 560-561) that neither *Roth* nor any subsequent decision dealt with that question but "dealt with the power of the State and Federal Governments to prohibit or regulate certain *public* actions taken or intended to be taken with respect to obscene matter." (Emphasis supplied.)

And again at p. 567: "But that case [*Roth*] dealt with public distribution of obscene materials and such distribution is subject to different objections." In note 10 on the same page the Court makes reference to the Model Penal Code § 251.4 (American Law Institute, Proposed Official Draft, 1962) which would also make commercial dissemination of obscene matter a criminal offense. The Court concludes by stating (p. 568):

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

Thus the Supreme Court itself has declared in clear, unambiguous language that the holding in *Roth* has not been overruled by the decision in *Stanley* and is still the law.

Accordingly, on the authority of *Roth*, I would reject as wholly unjustified the plaintiffs' contention that the Mas-

sachusetts obscenity statute is unconstitutional on its face.

On the question of abstention the pertinent cases are *Dombrowski* v. *Pfister*, 1965, 380 U.S. 479,[2] and *Zwickler* v. *Koota*, 1967, 389 U.S. 241[3] In both those cases the statutes under attack were held to be overbroad and susceptible of sweeping and improper application and therefore justifiably attacked on their face as abridging expression protected by the First Amendment. Additionally, though threatened with prosecution, the petitioner in neither case was then in fact being prosecuted for violating the challenged statute and consequently its constitutionality was not being litigated in the State court. In *Dombrowski* there was the added element of bad faith on the part of the State prosecutor, an element certainly not present here. The Court accordingly held that abstention was not appropriate. Since the Massachusetts statute is not being justifiably attacked on its face as abridging free expression and since the case in the Massachusetts Court has been tried and decided and is now on appeal, it seems to me especially appropriate for this Court to abstain from proceeding to a declaratory adjudication of the constitutionality of the statute until the Supreme Judicial Court shall have heard and decided the appeal. The parties anticipate that this will happen within the next three or four months.

No injunction should issue against the defendant district attorney. He should be left free to prosecute these plaintiffs should they resume the exhibition of the film while their conviction in the Superior Court remains outstanding and their appeals pending.

The plaintiffs have failed to show the existence of the requisite grounds that would justify the issuance of a preliminary injunction:

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[2] The statute under attack was the Louisiana Subversive Activities and Communist Propaganda Control Law.

[3] The statute prohibited the distribution of anonymous handbills critical of political candidates.

(1) Since the statute is not unconstitutional on its face and the film is assumed by the Court to be obscene,[4] and has been found to be obscene by the Superior Court, the plaintiffs have failed to establish the probability that they will ultimately prevail in this litigation.

(2) There is no evidence before us that plaintiffs will suffer irreparable injury if they are prevented from showing the film until final disposition of their appeal. There has been no showing of the extent of the monetary loss, if any, that they will suffer if they are not allowed to show the film. We should not concern ourselves with the diminution in the value of the film if its showing is delayed for a substantial period of time. The film is not owned by the plaintiffs, but by Grove Press, Inc.,[5] which is not a party to this litigation. Furthermore, there is no evidence of the economic value of the film.

(3) The mere possibility that plaintiffs may be deprived of a constitutional right pending final determination of this case does not amount to the irreparable injury necessary to justify the issuance of the injunction.

Thus, in *Dombrowski v. Pfister*, 380 U.S. 479, 484-485, the Court states:

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to

[4] In its Memorandum of July 15, 1969, this Court said: "[T]he Court . . . will not consider now or at any other time the claim that the film is not obscene, as an evidentiary matter."

[5] The motion of Grove Press, Inc., to intervene as a party plaintiff was denied by the Court on July 15, 1969.

the irreparable injury necessary to justify a disruption of orderly state proceedings."

What the majority of this Court is doing today is without precedent. It is declaring that the public, commercialized dissemination of obscene matter to adults, regardless of how lewd and degenerate it may be, is protected expression under the First Amendment. I have found no authority for this proposition either in decided cases or in legislative enactments. On the contrary numerous statutes, both Federal and State, and a multitude of cases decided by the Supreme Court of the United States[6] and by other courts, Federal and State, have consistently denounced and punished as criminal the public, commercialized dissemination of obscene matter.

In my opinion the position taken by the majority of this Court is legally unsound and inimical to the public interest. I must therefore dissent.

(s) ANTHONY JULIAN
ANTHONY JULIAN
United States District
Judge

---

[6] See, for example, the cases listed in *Stanley*, supra, notes 5 and 6, at page 561.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
[TITLE OMITTED]

ORDER ADDING PARTY

December 6, 1969

On motion of the plaintiffs, and without objection, the Honorable Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, is added as a party defendant.

By the Court,
(s) BAILEY ALDRICH
Circuit Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

December 6, 1969

INJUNCTION

[TITLE OMITTED]

This cause came on to be heard upon a motion for a preliminary injunction pending a decision on the merits, and after hearing, and upon the findings and rulings contained in the court's opinion of November 28, 1969, it is hereby ordered, adjudged and decreed as follows:

The defendants, their agents, servants and successors in office, shall not, until further order of this court, proceed against civilly or criminally, or otherwise interfere with, the plaintiffs Serafim Karalexis, James Vlamos, Symphony Cinema II, Inc. and Film Distributors, Inc. on account of the showing of a certain moving picture film entitled "I Am Curious (Yellow)." Provided, that this in-

junction shall not apply if the said picture is advertised in a manner pandering to a prurient interest in sex, or is shown to an audience not warned of its possibly offensive character, or is shown to children under the age of 18 years.

Provided, further, that the prosecution of proceedings connected with the appeal of the plaintiffs from a certain decision against them in the criminal side of the Suffolk Superior Court, short of ordering the execution of sentence or other penalties, is not hereby forbidden.

By the Court,
(s) Bailey Aldrich
(s) Raymond J. Pettine
District Judge

United States District Court
District of Massachusetts
[Title Omitted]

STAY PENDING APPEAL

December 6, 1969

On motion of the defendants the temporary injunction pending a decision on the merits entered this day is hereby stayed pending defendants' request to the Supreme Court for a stay pending their appeal from the issuance of said injunction.

By the Court,
(s) Bailey Aldrich
Circuit Judge

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No.

GARRETT BYRNE, AS HE IS THE DULY ELECTED DISTRICT ATTORNEY FOR SUFFOLK COUNTY, CITY OF BOSTON, COMMONWEALTH OF MASSACHUSETTS,

PETITIONER,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC., ALL OF 252 HUNTINGTON AVENUE, BOSTON MASSACHUSETTS.

APPLICATION FOR STAY

[December 15 1969]

ORDER

The motion for a stay of the temporary injunction issued by the United States District Court for the District of Massachusetts presented to MR. JUSTICE BRENNAN, and by him referred to the Court, is granted pending the timely filing and disposition of an appeal.

Should such an appeal not be filed, this stay is to expire automatically. Should such an appeal be timely docketed, this stay is to continue pending the Court's action on the jurisdictional aspect of the case. In the event the appeal is dismissed or the judgment below is summarily affirmed, this stay is to expire automatically. Should the Court note probable jurisdiction of the appeal or postpone further consideration of the question of jurisdiction to the hearing on the merits, this stay is to remain in effect pending the issuance of the judgment of this Court.

MR. JUSTICE DOUGLAS, dissenting.

Respondents are the owners and operators of a motion

picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass. Gen. Laws, c. 272, § 28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege *scienter*. The indictments were then dismissed, and new indictments were thereafter returned. Respondent's request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.

Respondents were convicted of the state obscenity offense on November 12, 1969. The applicant in this proceeding, the District Attorney for Suffolk County, has not agreed that respondents may exhibit the film pending the appeal of their convictions. On November 19, 1969, applicant moved the District Court to abstain from deciding the constitutionality of the Massachusetts statute, pending the resolution of that issue in the state courts. On November 28, 1969, the District Court, by a 2-1 vote, denied the motion and authorized a temporary injunction enjoining applicant from interfering with respondents as respects future showings of the film "I Am Curious (Yellow)," pending a final dispostion by the District Court on the merits.

Applicant now requests this Court to stay the temporary injunction which issued by the District Court.

The injunction issued by the District Court does not interfere in any way with the criminal conviction already obtained in the Massachusetts courts. That case will proceed unaffected by anything the federal court does, save for final execution of the state judgment. *Dombrowski v. Pfister*, 380 U.S. 479, is different. There we did not force petitioners to risk vindication of their constitutional rights in a state prosecution under an "overly broad" state statute. *Id.*, at 486. But in this case that risk was faced and resolution of the constitutional issues is being undertaken in the state courts. All that the federal court proposes is protection of respondents against repeated prosecutions, while both the state courts and the federal courts are resolving the constitutional issues. Enjoining one state prosecution, though perhaps permissible under *Ex parte Young*, 209 U.S. 123, would not be in keeping with more recent decisions. *Douglas* v. *Jeannette*, 319 U.S. 157. But I read the sparse record before us differently from MR. JUSTICE STEWART and believe that we deal here with threats of repeated prosecutions; and those threats seem to me to be no less ominous to the federal constitutional regime than the threatened harassment of union leaders in *Hague* v. *CIO*, 307 U.S. 496, who were asserting First Amendment rights in explaining the purposes of the new National Labor Relations Act. See the opinion of Mr. Justice Roberts and MR. JUSTICE BLACK, *id.*, at 504-506.

There may in time be a collision between the two systems for us to resolve. Meanwhile I would let the two orderly processes go ahead. For I can imagine no better and smoother accommodation of the needs of the two regimes than that designed by the District Court.

Underlying the state case and the federal case is an important First Amendment question. Some people think that "obscenity" is not protected by the Free Speech and Free Press Clauses of the First Amendment. They believe

that both Congress and the States can set up regimes of censorship to weed out "obscenity" from literature, movies, and other publications so as to rid the press of what they the judges deem to be beyond the pale.

I have consistently dissented from that course but not because, as frequently charged, I relish "obscenity." I have dissented before and now because I think the First Amendment bars all kinds of censorship. *Ginsberg* v. *New York*, 390 U.S. 629, 650 (DOUGLAS, J., dissenting); *Ginzberg* v. *United States*, 383 U.S. 463, 482 (DOUGLAS, J., dissenting); *Roth* v. *United States*, 354 U.S. 476, 508 (DOUGLAS, J., dissenting). To impose a regime of censors requires in my view, a constitutional amendment. "Obscenity" is no exception. "Obscenity" certainly was not an established exception to free speech and free press when the Bill of rights was adopted. See my concurring opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 428-433. It is a relatively new arrival on the American scene, propelled by dedicated zealots to cleanse all thought.

Prior to the Bill of Rights, state law, when it spoke of freedom of the press, meant only freedom from prior restraint. But an author or publishers could be held accountable for publishing what the state house thought was against "the public good". In other words, the First Amendment did not build on existing law; it broke with tradition, set a new standard, and exalted freedom of expression. There is no trace of a suggestion that "obscenity," however defined, was excepted.

That does not mean that "obscenity" is good or that it should be encouraged. It only means that we cannot be faithful to our constitutional mandate and allow any form or shadow of censorship over speech and press.[1]

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[1] John Hohenberg recently stated this First Amendment philosophy in a slightly different setting:

"As Aleksandr Solzhenitsyn wrote in bitter response to his re-

When our rewards go to people for thinking alike, it is no surprise that we become frightened at those who take exception to the current consensus. Then the hue and cry go up for censors; and that is the start of an ominous trend. What can be done to literature under the banner of "obscenity" can be done to other parts of the spectrum of ideas when party or majoritarian demands mount and propagandists start declaiming the law.

The "obscenity" issue raises large questions. To what extent may government watch over one's shoulder as he reads?

Judge Jerome Frank said in *Roth* v. *Goldman*, 172 F. 2d 788, 792:

> "I think that no sane man thinks socially dangerous the arousing of normal sexual desires. Consequently, if reading obscene books has merely that consequence, Congress, it would seem, can constitutionally no more suppress such books than it can prevent the mailing of many other objects such as perfumes, for example, which notoriously produce that result. But the constitutional power to suppress obscene publications might well exist if there were ample reason to believe that reading them conduces to socially harmful sexual conduct on the part of normal human beings. . . . Macaulay, replying to demands for suppression of obscene books, said: 'We find it difficult to believe that in a world so full of

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moval from the rolls of the Russion Writers' Union late in 1969 following the West's sympathetic reception of two of his novels that he could not have published in his own country: 'It is time to remember that the first thing we belong to is humanity. And humanity is separated from the animal world by thought and speech, and they should naturally be free. If they are fettered, we go back to being animals. Publicity and openness, honest and complete—that is the prime condition for the health of every society, and ours too.'

"Wherever freedom is denied, these words will live on." Saturday Review, December 13, 1969, pp. 70, 72.

temptations as this, any gentleman, whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them.' Substitute 'Waggish Tales from the Czech'. for 'Aristophanes and Juvenal,' and those remarks become relevant here."

If "obscenity" can be carved out of the First Amendment, what other like exceptions can be created? Is "sacrilege" also beyond the pale? Are utterances or publications made with "malice" unprotected? How about "seditious" speech or articles? False, scandalous, and malicious writings or utterances against the Congress or the President "with intent to defame" or to bring them "into contempt or disrepute" or to "excite" against them "the hatred of the good people" or "to stir up sedition," or to "excite" people to "resist, oppose or defeat" any law were once made a crime. (1 Stat. 596-597.) Now that the First Amendment applies to the States, *Stromberg* v. *California*, 283 U.S. 359; *Near* v. *Minnesota*, 283 U.S. 697, may the States embark on such totalitarian controls over thought or over the press? May Congress do so?

We forget today that under our constitutional system neither Congress nor the States have any power to pass pass on the value, the propriety, the Americanism, the soundness of any idea or expression. It is that insulation from party or majoritarian control provided by the First Amendment—not our gross national product or mass production or pesticides or space ships or nuclear arsenal—that distinguishes our society from the other planetary regimes.

Opinion of MR. JUSTICE BLACK.

I agree completely with MR. JUSTICE DOUGLAS that state criminal punishment of these respondents for showing an allegedly "obscene" film is absolutely prohibited by the First and Fourteenth Amendments. That, however, does

not end for me the constitutional problems involved. In this case a Federal District Court stepped into the middle of a pending state criminal prosecution, rendered an opinion in effect deciding the fundamental constitutional issue in the state case, and enjoined the initiation of new prosecutions of these defendants or the execution of any sentence imposed on them in the pending state case. One of the fundamental aspects of our federal constitutional system requires that federal courts refrain from interfering in pending state criminal prosecutions except in highly unusual and very limited circumstances. I do not think the facts of this case present an occasion for departure from that general rule. It is for that reason alone that I agree with the Court's decision to stay the injunction issued by the Federal District Court against the State.

Opinion of MR. JUSTICE STEWART.

Without reaching the First and Fourteenth Amendment issues discussed by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, I join the Court's decision to stay the injunction for the reason indicated by MR. JUSTICE BLACK —*i.e.*, the general rule that "requires that federal courts refrain from interfering in pending state criminal prosecutions. . . ." This case does not now present the "highly unusual and very limited circumstances" that would justify a departure from that rule—such as would be presented by the threat or actuality of repetitive prosecutions for exhibition of the film in question.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

SUPPLEMENTAL NOTICE OF APPEAL

Notice is hereby given that GARRETT BYRNE and ROBERT H. QUINN, defendants in the above entitled action, hereby appeal to the Supreme Court of the United States from the

orders of this Court, dated November 28, 1969, and December 6, 1969, enjoining the defendants from proceeding against the plaintiffs, civilly or criminally, on account of the showing of a certain motion picture film entitled "I Am Curious (Yellow)."

This appeal is taken pursuant to the provisions of 28 U.S.C. 1253.

GARRETT H. BYRNE
ROBERT H. QUINN
Defendants.
By their attorney:
JOSEPH J. HURLEY
First Assistant Attorney General
LAWRENCE P. COHEN
Assistant Attorney General.

GARRETT H. BYRNE,
District Attorney,
Suffolk County.
THEODORE A. GLYNN, JR.
Special Assistant District Attorney
Suffolk County

SUPREME COURT OF THE UNITED STATES
[TITLE OMITTED]

"The motion to vacate the order of this Court of December 15, 1969, is denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted. In this case (No. 1149) probable jurisdiction is noted. The case is placed on the summary calendar and set for argument immediately following No. 905."

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* In lieu of Robert H. Quinn, Attorney General.

JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

GARRETT H. BYRNE,
District Attorney,
Suffolk County.
THEODORE A. GLYNN, JR.,
Special Assistant
District Attorney,
Suffolk County.

ROBERT H. QUINN,
Attorney General.
JOHN WALL,
Assistant Attorney General,
Chief, Criminal Division.
LAWRENCE P. COHEN,
Assistant Attorney General.

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No.

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Jurisdictional Statement

Appellants appeal from the order of the United States District Court for the District of Massachusetts, entered on December 6, 1969, enjoining relevant state law enforcement officers from prosecuting the public showing of the

film, "I Am Curious (Yellow)", and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

Opinion Below

The opinion of the United States District Court for the District of Massachusetts is not yet reported and is included herein as Appendix A.

Jurisdiction

The judgment of the United States District Court for the District of Massachusetts authorizing the issuance of a preliminary injunction was entered on November 28, 1969. The preliminary injunction was issued on December 6, 1969 (App. B). On December 15, 1969, this Court stayed the order of the United States District Court for the District of Massachusetts pending the filing of a Jurisdictional Statement, *Byrne* v. *Karalexis, et al.* (38 U.S.L.W. 3221). A timely Supplemental Notice of Appeal was filed on December 24, 1969. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1253.

Question Presented

Whether the district court erred in enjoining relevant state law enforcement officers from prosecuting the public showing of the film, "I Am Curious (Yellow)"—a film which the Massachusetts Superior Court found, and the district court assumed, to be obscene under the applicable constitutional tests set forth by this Court.

Statute Involved

Mass. Gen. Laws, ch. 272, §28A, provides:

> "Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phono-

graphic record, or other things which is obscene, indecent or impure, or an obscene indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house or correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction."

Statement

On June 3, 1969, the appellees were indicted by the Suffolk County Grand Jury of possessing with intent to exhibit, and exhibiting, an obscene film—"I Am Curious (Yellow)"—in violation of Mass. Gen. Laws, Ch. 272, §§28A and 32, respectively. On or about June 17, 1969, appellees filed an Amended Complaint[1] in the United States District Court for the District of Massachusetts seeking, *inter alia*, to enjoin future prosecutions of the film, and to declare the prosecution of that film and the statutes (Mass. Gen. Laws, Ch. 272, §§28A, 32) unconstitutional on their face (R. 2).[2] On June 24, 1969, a three-judge district court temporarily enjoined the prosecution on the ground that the indictments

[1] The original complaint was withdrawn by the respondents prior to the filing of a response by the appellant, Garrett H. Byrne.

[2] Prior to preparation of this Jurisdictional Statement, the record was transmitted to the Clerk of this Court. References ("R") are therefore to the Index Number assigned to the particular document.

did not allege *scienter* (R. 3). On June 25, 1969, the Suffolk County Superior Court, with the assent of the district attorney, dismissed the indictments. On or about June 30, 1969, appellees filed an amendment to their Amended Complaint in which they alleged that they had sufficient cause to believe that new indictments would be returned, and renewed their request that the appellant Garrett H. Byrne be enjoined from prosecuting the film (R. 6). Thereafter, the Suffolk County Grand Jury returned new indictments charging all appellees with possessing, with intent to exhibit, obscene matters—the film, "I Am Curious (Yellow)"—in violation of Mass. Gen. Laws, Ch. 272, §28. On July 15, 1969, the district court, after a hearing, denied the motion for a temporary injunction, stating (R. 11, p. 2):

> "The motion for a temporary injunction is denied at this time, subject to renewal if and when petitioner is convicted in the Suprerior Court. If petitioner is convicted and the prosecution offers to renew the present stipulation, that no seizure of film or interruption with the showing will be made, the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against the petitioner, or for 30 days after verdict, whichever shall first occur."

On November 12, 1969, the appellees were convicted in the Suffolk County Superior Court. At the present time, exhibition of the film has been discontinued, and the appellants have not agreed that appellees may exhibit the film pending pursuit of appropriate state appellate remedies.

On or about November 19, 1969, appellant Garrett H. Byrne moved the district court to abstain from granting the relief sought in the Complaint pending resolution of the issues raised therein by the Massachusetts Supreme Ju-

dicial Court (R. 13). On November 28, 1969, after further argument, the district court, one judge dissenting, denied the motion for abstention, and ordered the issuance of a preliminary injunction enjoining future prosecutions of the film, "I Am Curious (Yellow)" (App. A). On December 6, 1969, the district court issued the preliminary injunction (App. B), but stayed its effect pending the disposition of an application for a stay by this Court pursuant to the provisions of Rules 18, 50, and 51, of the Rules of this Court. (R. 22, 23). On the same date, Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, was ordered added as a party defendant without objection (R. 21). On December 15, 1969, this Court stayed the effect of the preliminary injunction issued by the district court pending the filing and disposition of a Jurisdictional Statement (App. C). A timely notice of appeal was filed on December 24, 1969 (R. 27).

The Questions are Substantial

In support of the motion for abstention, the appellant argued below: (1) that this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557, 37 U.S.L.W. 4315, does not indicate a departure from the established rule, *Roth* v. *United States*, 345 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413, that a state may constitutionally proscribe the commercial distribution and dissemination of obscene material; and (2) even if *Stanley* does indicate such a departure, final determination of that issue should be left to the Supreme Judicial Court of Massachusetts, which has the power to construe, in appropriate circumstances, state statutes presenting possible constitutional conflict. A majority of the district court—extending *Stanley* further than any other court to date—found "* * * it probable that *Roth* remains intact only with respect to public dis-

tribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned." (App. A. ——). It accordingly found it probable that the statute (Mass. Gen. Laws, Ch. 272, §28A) is overbroad, and thus, unconstitutional on its face. A majority of the district court further held that, in the circumstances of this case, abstention would be improper (App. A. 19).

1. In our view, the district court abused its discretion in granting the preliminary injunction in the circumstances of this case. See *United States* v. *Corrick*, 298 U.S. 435; *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310. Although the *apparent* effect of the preliminary injunction goes no further than allowing the appellees to show the film, "I Am Curious (Yellow)", under certain limited conditions—*i.e.*, the "injunction shall not apply if the said picture is advertised in a manner pandering to a prurient interest in sex, or is shown to an audience not warned of its possibly offensive character, or is shown to children under the age of 18 years" (App. B)—the *true* and *practical* effect runs much deeper. The district court did not purport to rule that the statute (Mass. Gen. Laws, Ch. 272, §28A) was unconstitutionally applied to the appellees in the circumstances of this case; it went further and, for all practical purposes, held that the statute itself was unconstitutional on its face because of its alleged overbreadth. In this posture, the Commonwealth of Massachusetts is, for all intents and purposes, presently without a statute to prosecute even that type of distribution of obscene material which this Court has indicated a state may properly proscribe. See *Redrup* v. *New York*, 386 U.S. 767.[3]

[3] Our concern here is not hypothetical. Already two persons previously convicted of selling obscene magazines in violation of Mass. Gen. Laws, ch. 272, §28A (see *Commonwealth* v. *Johnson*, 1969 Mass. Adv. Sh. 824, certiorari denied *sub nom. Johnson*

As we read the applicable decisions of this Court, a federal district court, in determining whether or not to grant injunctive relief similar to that granted here, must independently assess two separate and distinct factors: First, whether a cause of action in equity is stated which would warrant the granting of injunctive relief, *Douglas* v. *City of Jeanette*, 319 U.S. 157; *Zwickler* v. *Koota*, 389 U.S. 241; and secondly, assuming that injunctive relief is otherwise warranted, whether it would be appropriate to abstain pending further proceedings in the state courts. *Dombrowski* v. *Pfister*, 380 U.S. 479; *Zwickler, supra; Cameron* v. *Johnson*, 390 U.S. 611.

A. In assessing the first condition—*i.e.*, the requisites for injunctive relief—this Court has pointed to traditional equitable considerations governing the granting *vel non* of injunctive relief. This approach essentially amounts to a balancing of various interests including, but not limited to, the possibility of irreparable injury which would be suffered by the petitioning party absent the grant of injunctive relief, *Dombrowski, supra*, at 485-489; and the impact of injunctive relief upon the proper administration of law enforcement by state law enforcement officers. *Douglas, supra.*

In our view, the district court erred in finding an irreparable injury which, on balance with other countervailing considerations, warranted immediate injunctive relief.

In finding irreparable injury, a majority of the district court pointed to a supposed monetary loss of box office

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v. *Massachusetts*, No. 458, O.T. 1969 [38 U.S.L.W. 3223]), and whose convictons — in our view — are sustainable under any interpretation of this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557, have filed petitions for a writ of habeas corpus on the ground, *inter alia*, that the statute is unconstitutional on its face under the holding of the district court in the present case. See *Joseph M. Palladino, Sr.* v. *Joseph V. McBrine*, Misc. Civil No. 70-7-J (D. Mass.); *John L. Hynt* v. *Howard W. Fitzpatrick*, Misc. Civil No. 70-8-G (D. Mass).

receipts which would be caused by a delay in showing the film (App. A. 20). As properly pointed out in the dissenting opinion (App. A. 26-27), however, the appellees never alleged—much less showed—any facts indicating the extent of a monetary loss, if any, which would be caused by delay. A majority of the district court simply assumed —without any showing or substantiation whatsoever—that a delay in exhibition would cause a proportionate loss in box office receipts. This finding simply was not warranted by the record before the district court.[4]

A majority of the district court also indicated "* * * that in assessing injury the chilling effect upon the freedom of expression of others is to be considered." (App. A. 20). Without challenging the correctness of that approach, it is nevertheless clear that—in the circumstances of this case—no irreparable injury can be shown. In the present case, the district court assumed the film to be obscene in the constitutional sense (App. A. 17). It thus assumed, *inter alia*, that the film was utterly without redeeming social value. *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418. In these circumstances, it can hardly be argued that depriving "others" of a chance to see a film which is utterly without redeeming social value amounts to a showing of irreparable injury.

Moreover, even assuming that there was a valid allegation and showing of irreparable monetary loss, that showing, on balance, does not warrant the relief granted by the district court. As pointed out above, the effect of granting injunctive relief in the circumstances of this case runs deeper than merely allowing the film to be exhibited during appellees' pursuit of appropriate state appellate reme-

[4] If past experience serves as a relevant guide, it seems to us that box office activity is heightened, not diminished, by the publicity engendered by legal proceedings such as the present proceeding.

dies. In granting injunctive relief ancillary to the complaint, the district court has, for all practical purposes, decided a fundamental question of law—*i.e.*, that the Massachusetts obscenity statute (Mass. Gen. Laws, ch. 272, §28A) is unconstitutional on its face. It thus—for all practical purposes—has left the Commonwealth of Massachusetts without a statute to prosecute those kinds of obscenity violations which otherwise could be properly prosecuted by the state. See *Redrup* v. *New York*, 386 U.S. 767. In these circumstances, there was no showing in the district court of facts which, on balance, would warrant a departure from the established rule that a federal court should not interfere, by way of injunctive relief, with the good faith administration of criminal laws by state enforcement officials.[5] *Douglas* v. *City of Jeanette*, *supra*.

B. Even if the appellees properly alleged a cause of action in equity warranting immediate injunctive relief, the district court erred in not abstaining in the circumstances of this case. This Court has repeatedly indicated that abstention is appropriate where litigation in the state court would avoid an unnecessary decision by the federal court of a serious constitutional question, or where it would present the constitutional issue to the federal court in a completely different posture. *Harrison* v. *NAACP*, 360 U.S. 167; *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-189; *Zwickler* v. *Koota*, 389 U.S. 241, 255-256 (concurring opinion of Mr. Justice Harlan).[6] In

[5] In this particular, the present case is clearly distinguishable from *Dombrowski* v. *Pfister*, 380 U.S. 479. In that case, there was a showing that prosecutions were threatened in bad faith, with no hope of ultimate success at trial, and simply for the ulterior purpose of discouraging the plaintiffs from exercising protected First Amendment activities. In the present case, there was no allegation — much less any showing — of bad faith on the part of the prosecutor.

[6] As noted by this Court (*Zwickler*, at 249, n. 11), abstention is also appropriate in diversity cases where adjudication of a con-

the present case, the appellees posed a frontal challenge to the constitutionality of the statute (Mass. Gen. Laws, ch. 272, §28A) on its face. They essentially alleged and argued that a logical extension of this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557, constitutionally precludes a state from proscribing an adequately controlled public exhibition[7] of an obscene film; that the Massachusetts statute, on its face, proscribed such conduct; and thus, that the statute was impermissibly overbroad and unconstitutional on its face. The appellants argued against an extension of *Stanley* to the bench mark suggested by appellees. The appellants further argued that, since the action was framed within the context of a challenge to the constitutionality of the statute on its face, the court should abstain pending further proceedings—and possible construction—in the state courts. The district court denied the motion for abstention.

In our view, the district court erred and abused its discretion in not abstaining pending further proceedings in the state court. In the context in which the action was framed, the district court was asked to pass on the constitutionality of the statute as written, without benefit of state construction. Thus, even though that statute is obviously constitutional on its face to the extent that it proscribes commercial distribution in a manner offensive to an unwilling audience, the district court could not judicially carve and construe that statute so as to separate the good from the bad. If left to the Massachusetts Supreme Judicial Court, however, that court could—if it found that Stanley precludes prosecution for the adequately

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stitutional issue is in part dependent upon construction of local law; and in cases involving possible disruption of complex state administrative processes.

[7] *I.e.*, exhibition in a manner which would preclude the admission of minors, preclude pandering, and which would warn prospective patrons of the possible offensiveness of the film.

controlled public exhibition of obscene films—construe the statute accordingly, reverse the convictions, and still leave the Commonwealth free to prosecute other obscenity violations which are left unaffected by *Stanley*. That court has not, in the past, shown its reluctance to construe the statute here in question in order to meet constitutional mandate. Thus, following this Court's decision in *Smith* v. *California*, 361 U.S. 147, the Massachusetts Supreme Judicial Court construed the present statute so as to avoid future constitutional conflict. See *Demetropolis* v. *Commonwealth*, 342 U.S. 658. We have no hesitancy in stating here that—given the task—the Supreme Judicial Court will again review the constitutionality of that statute in light of emerging constitutional doctrine, and construe the statute accordingly.[8] In these circumstances, the district court erred in not abstaining pending further appellate proceedings in the state courts.

2. As noted above, the fountainhead of the district court's action below was that court's conclusion that under *Stanley v. Georgia*, 394 U.S. 557, a state cannot constitutionally prohibit the "adequately controlled" public exhibition of obscene films. In our view, the decision of

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[8] During oral argument on the motion for abstention, Chief Judge Aldrich suggested that further construction would be unreasonable to assume — especially in view of the fact that the legislature obviously could not have anticipated the *Stanley* decision (November 21, 1969 Hearing Tr. 16). Other opinions of the Massachusetts Supreme Judicial Court strongly suggest, however, that that court will strive to narrowly construe a statute to save its constitutionality in the face of emerging constitutional doctrine even if that construction involves the application of considerations not available to the legislature when originally passed. Thus, in *Alegata* v. *Commonwealth*, 353 Mass. 287, 302-304, a challenge was made to the constitutionality of the "disorderly conduct" statute (Mass. Gen. Laws, ch. 272, §53). The court narrowly construed the statute and gave it the same meaning as given to it by Section 250.2 of the Model Penal Code (Proposed Official Draft), even though that definition obviously was not available to the legislature when the statute was originally enacted in 1943.

the district court—which goes further than any other decision to date—raises a substantial question which necessitates final resolution by this Court.

In *Roth* v. *United States*, 354 U.S. 476, a majority of this Court unequivocally held that obscenity[9] is not protected by the First Amendment to the United States Constitution. We are aware of no decision by this Court—prior to *Stanley*—which even intimates a departure from that holding. Indeed, less than four years ago, a majority of this Court reaffirmed the principle that commercial distribution of obscene material is not protected by the First Amendment. *Ginsberg* v. *United States*, 383 U.S. 463; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

In our view, *Stanley* does not indicate the demise of *Roth* and its progeny. In that case, the Georgia statute under challenge (Ga. Code Ann. §26-6301 [Supp. 1968]) proscribed, *inter alia*, private possession of material known to be obscene. This Court, in part pointing to complementary roles between the First and Fourth Amendments, reversed the conviction based upon that statute, holding that a State cannot constitutionally punish a person for private possession of obscene material within the privacy of his home. Nothing in that decision, however, detracts from the continued vitality of *Roth*. Indeed, this Court went to great lengths to narrow the import of its holding, stating:

> *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with obscenity. * * *

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[9] A plurality of this Court has held that material may properly be adjudged as obscene if it is "* * * established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418.

Roth and the cases following it discerned such an "important interest" in the regulation of *commercial distribution* of obscene material. (37 U.S.L.W. at 4317) (Emphasis added).

> We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime [footnote omitted]. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.

In view of this limiting language, it is our view that the *Stanley* decision is applicable only where the Fourth Amendment considerations present in that case are also present. Lacking such Fourth Amendment considerations —as would be the case where public distribution is involved—the First Amendment protection does not attach, and prosecution is therefore proper.[10]

Moreover, even if we are wrong in our assumption that the First Amendment does not provide a haven for those who commercially distribute obscene material, nevertheless, the issue is significant enough to warrant final clarification and resolution by this Court. It is no secret that the issue of obscenity *vis a vis* the law is one which divides not only the judiciary, but the nation as well. In order to cope with this mounting problem, the Commonwealth of Massachusetts, as well as other jurisdictions,[11] has estab-

[10] The notion that the First and Fourth Amendments, under a given set of circumstances, complement each other, is not a new one, but has been expressed by individual Justices of this Court. See *Lopez* v. *United States*, 373 U.S. 427, 469-470 (dissenting opinion of Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Goldberg joined).

[11] See *e.g.*, Public Law 90-100, 83 Stat. 253 (1967).

lished commissions and other legislative advisory groups in order to indicate the direction in which further legislative action should be taken, if any. At the present time, such activity has been slowed to a standstill, since the permissible area in which legislation may be directed is far from clear as a result of the *Stanley* decision. In these circumstances, only this Court can fully and finally measure and delineate the impact of the *Stanley* decision on the administration of law enforcement by the several states.[12]

Conclusion

For the reasons stated above, it is respectfully submitted that the questions presented on appeal are substantial and that they are of public importance. It is therefore respectfully submitted that this Court should note probable jurisdiction, and set the matter for argument.

Respectfully submitted,

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Chief, Criminal Division.
LAWRENCE P. COHEN,
Assistant Attorney General.

[12] This Court has noted probable jurisdiction in *Batchelor* v. *Stein*, No. 565, O.T. 1969 (38 U.S.L.W. 3205). Although one of the questions presented in that case is similar to that presented herein, disposition of that case would not necessarily control the disposition here. In that case, it appears that the appellee was threatened with prosecution under a statute which, *inter alia*, prohibited private possession of obscene material. The statute here in question (Mass. Gen. Laws, ch. 272, §28A) does not reach private possession, and the Court in the *Batchelor* case may not reach the issues presented herein. Moreover, the statute involved in the *Batchelor* case defines obscenity according to a *local* standard, not a *national* standard as indicated by this Court in *Jacobellis* v. *Ohio*, 378, U.S. 185, 193-195. Thus, *Batchelor* would not be dispositive of the questions presented here.

EXHIBIT A

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-665-J

SERAFIM KARALEXIS ET AL.,
PLAINTIFFS,
v.
GARRET H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts
DEFENDANT.

Before ALDRICH, *Circuit Judge*,
JULIAN and PETTINE, *District Judges*.

OPINION

November 22, 1969

ALDRICH, *Circuit Judge*. This is a three-judge district court action in which a frontal attack is made upon a state obscenity statute, based upon the Court's recent decision in *Stanley* v. *Georgia*, 1969, 394 U.S. 557. In that case the Court reversed a state conviction for possession of a concededly obscene moving picture film, found in the home of the defendant. We are asked to rule that this decision extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

Briefly, the facts are these. Plaintiffs Karalexis et al. are the owners and operators of a moving picture threatre which has been engaged in showing a film, owned and

leased by Grove Press, Inc.,[1] entitled "I Am Curious (Yellow)." The named defendant is the county district attorney who has charged plaintiffs with violation of Mass. G.L. c. 272 § 28A[2] as a result of their exhibiting the film, but notice has been given, 28 U.S.C. § 2284, and an assistant attorney general has conducted the defense throughout. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against prosecution thereunder. Because of the fact that the original indictments were defective, the proceedings sought to be enjoined postdate the assumption of jurisdiction by this court, and no question arises under 28 U.S.C. § 2283, the anti-injunction, or what is sometimes called the comity, statute.

Defendant's broad motion to dismiss tests the substance of plaintiffs' case. Our present question, however, is only whether we shall issue a temporary injunction pending final disposition, there being possible reasons to withhold the making of a final decision, which we have not yet fully explored. Alternatively, there is the question whether we should abstain altogether, without granting temporary relief. With respect to the first question the issues, of course, are whether there is a probability that plaintiffs will ultimately prevail, *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 1 Cir., 1968, 390 F.2d 113, *cert. denied* 391 U.S. 914, and the adequacy of the remedy at law.

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[1] Grove Press, Inc.'s motion to intervene was originally denied, counsel being permitted, instead, to appear as an amicus. In view of this opinion, Grove Press may be allowed to renew its motion at an early date.

[2] "§ 28A. Importing, printing, distributing or possessing obscene things.

Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . . ."

The following facts appear by stipulation of counsel or otherwise. Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg* v. *United States*, 1966, 383 U.S. 463. Finally, it is conceded that the threatre is policed, so that no minors are permitted to enter.

For purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts courts.[3] In this connection we note that the Superior Court of Massachusetts, in the recent case of *Commonwealth* v. *Karalexis*, has found that "the dominant theme of the film ... is its appeal to prurient interest in sex .... [The film] is patently offensive to the average person and an affront to community standards ... [It] is utterly without redeeming social value." Except insofar as it found statements in the opinion favorable to its conclusions in other respects, the Superior Court disposed of *Stanley* v. *Georgia* by stating it to be "irrelevant."

In *Stanley* Mr. Justice Marshall wrote the opinion of the Court in which four others joined. Mr. Justice Black concurred in the result because, in his mind, no case-by-case reasoning is needed in the area of obscenity; all is permissible.[4] The remaining three justices concurred on

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[3] Another court, viewing this same film, has differed. *United States* v. *"I Am Curious (Yellow),"* 2 Cir., 1968, 404 F.2d 196.

[4] The Superior Court's extensive analysis in *Karalexis* of a decade of the Supreme Court's views, reaching the conclusion that there is no majority agreement on any one approach to obscenity apart from the fact that it disregards such an agreement in *Stanley*, overlooks the fact that if only four or even three, justices agree on one method by which immunity is reached, this agreement is as significant as if five joined, so long as there are enough other justices who can be counted on to concur in the result. If we may be pardoned the analogy, if deuces are wild, an inside straight flush and a deuce takes the pot.

Fourth Amendment grounds,[5] stating that the obscenity question should not have been reached. The Court held that in certain circumstances possession of a moving picture film is constitutionally protected even though by contemporary standards the film is obscene. We do not consider this irrelevant.

The question is, how far does *Stanley* go. Is the decision to be limited to the precise problem of "mere private possession of obscene material," 394 U.S. at 561; is it the high water mark of a past flood, or is it the precursor of a new one? Defendant points to the fact that the Court in *Stanley* stated that *Roth* v. *United States*, 1957, 354 U.S. 476, was "not impaired by today's holding," and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. at 485,[6] whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was "devoid of any ideological content" was irrelevant. 394 U.S. at 566.

Of greater importance, a need for affirmative proof that obscenity raises a "clear and present danger of antisocial conduct or will probably induce its recipients to

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[5] Not the Fourth Amendment grounds on which the defendants assert the majority opinion rests. The three concurring justices regarded the warrant under which Stanley's home had been searched insufficient to justify the seizure of the film. The opinion of the Court, pointedly, it may be thought, ignored that issue. The present defendant's claim that, nevertheless; the Court looked to a Fourth Amendment general protection of privacy, is made in the face of the fact that the Court spoke constantly in terms of the First and Fourteenth Amendments and did not mention the Fourth.

[6] "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 494.

such conduct," rejected in *Roth*, was stated in *Stanley* to have been rejected in the area of "public distribution." The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful.[7] 394 U.S. at 567. Had the Court considered obscenity harmful as such, the fact that the defendant possessed it privately in his home would have been of no consequence.

In recognizing that public distribution differed from private consumption, the Court in *Stanley* gave two examples. In the case of public distribution, "obscene material might fall into the hands of children ... or ... it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with *Stanley*, "No such dangers are present in this case."

We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier.[8] A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. *Cf. Griswold* v. *Connecticut*, 1965, 381 U.S. 479. If a rich Stanley can

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[7] Non constat that a film which went beyond ordinary obsenity by exhorting sexual misconduct might be prohibited. Exhortation is not suggested in the case at bar.

[8] It may be suggested that the supplier would run a particular risk, since the apprehended possessor of the film would, under *Stanley*, have no Fifth Amendment privilege to resist inquiry.

view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.[9]

So much for the probability of success. We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset.[10] It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. *See Dombrowski* v. *Pfister*, 1965, 380 U.S. 479, 486-89.

This leads us to defendant's contention that we should, nevertheless, abstain until the Massachusetts Supreme Judicial Court has considered this question, since plaintiffs can raise it in their appeal from their Superior Court convictions. However, if our interpretation of *Stanley* is correct, we find it difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness. Hence we must regard abstention as improper. *Zwickler* v. *Koota*, 1967, 389 U.S. 241. In the field where Congress has established a three-judge district court, abstention may still be warranted if there is a reasonable likelihood that the state court may construe its statute so as to avoid constitutional issues, but abstention is not appropriate simply to allow the state court

[9] For a further discussion of *Stanley* v. *Georgia*, *see* The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 147-154 (1969).

[10] The fact that plaintiffs are economically motivated is of no significance. *New York Times* v. *Sullivan*, 1964, 376 U.S. 254. In *Interstate Circuit, Inc.* v. *Dallas*, 1968, 390 U.S. 676 at 684, the Court spoke disapprovingly of the effect of the Dallas ordinance upon "one who wishes to convey his ideas through that medium [films], which of course includes one who is interested not so much in expression as in making money. . . ."

to be the one to decide the statute's basic conflict with the federal constitution.[11]

We do not understand, however, certain apprehensions voiced by the defendant. We note, accordingly, that this is a decision of probability, not a final holding that the Massachusetts statute is unconstitutional. Much less is it a decision that one who distributes to children, or who creates a clear public nuisance, has standing to raise the contention that the statute is overbroad.[12] The preliminary injunction presently to issue will be restricted to, and conditioned upon, plaintiffs' adherence to the restrictions described earlier in this opinion. Nor do we consider the difference between the right to regulate conduct as distinguished from expression. *Cf. Derrington* v. *City of Portland, Or.*, 2/26/69, *cert. denied* 38 L.W. 3170. Finally, we voice no opinion as to the legal consequences if plaintiffs exhibit that under the protection of our injunction, and it is ultimately determined that our view was mistaken and that such exhibition was properly considered illicit.

Because of the importance of the matter, the injunction will not issue for one week, to permit plaintiffs to add other parties, if so advised, and to give the defendant

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[11] There is an alternative possibility, that the Supreme Judicial Court would find the film not obscene. The Superior Court, in an elaborate opinion, has found otherwise. We are not moved by the thought that we should postpone permitting plaintiffs to exhibit their film on the ground that, after all, it is *not* obscene.

[12] Normally standing is granted only when a defendant's own conduct is constitutionally protected. *United States* v. *Raines*, 1960, 362 U.S. 17. This rule has been relaxed in cases dealing with statutes affecting free expression. *See United States* v. *Raines*, *supra*, at 22 (dictum); *Thornhill* v. *Alabama*, 1940, 310 U.S. 88, 96-98; Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962). However, even where free speech is involved, it may be that standing should not be granted unless the defendant's conduct is at least *arguably* constitutionally privileged. *Cf. Brown* v. *Louisiana*, 1966, 383 U.S. 131, 143, 147-48 (concurring opinion of Mr. Justice Brennan); *Dennis* v. *United States*, 341 U.S. 494, 515-17. We do not reach such questions.

the opportunity to apply to the Circuit Justice for a stay.

(s) BAILEY ALDRICH
U.S. Circuit Judge

(s) [ILLEGIBLE]
U.S. District Judge

UNITED STATES DISTRICT COURT
District of Massachusetts

Civil Action
No. 69-665-J

SERAFIM KAŔALEXIS ET AL.,
PLAINTIFFS

v.

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts,
DEFENDANT

Before ALDRICH, *Circuit Judge*
JULIAN and PETTINE, *District Judges*

DISSENTING OPINION

November 28, 1969

JULIAN, J. (dissenting)

I do not agree with the majority. The constitutionality of the Massachusetts criminal obscenity statute[1] is presently being litigated in the Massachusetts Courts. Pend-

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[1] Mass. G.L. c. 272, § 28A provides as follows:

"Whoever . . . has in his possession . . . any obscene . . . print, picture, figure, image . . . for the purpose of . . . exhibition . . . shall be punished . . . ."

The Massachusetts Court has construed this statute implicitly to require proof that the defendant *knowingly* has such material in his possession. *Demetropolos* v. *Commonwealth*, 1961, 342 Mass. 658.

ing final adjudication by the Supreme Judicial Court of the plaintiffs' appeal from their conviction in the Superior Court for violating that statute, this Court should abstain from taking further action in this case and should not interfere with the enforcement of the statute by the Commonwealth by enjoining its public officials from prosecuting the plaintiffs for additional violations of the statute should they persist in exhibiting the film while their conviction still stands.

It is my understanding that for the purpose of deciding the questions presently before us the Court assumes that the film involved in this litigation is in fact obscene within the meaning of the law. In fact, no evidence has been taken and no finding made on this issue by this Court. The Superior Court has found the film to be obscene.

The plaintiffs' reliance on *Stanley* v. *Georgia*, 394 U.S. 557 (1969), is untenable. The case before us is governed by *Roth* v. *United States*, 354 U.S. 476 (1957). The precise issue in *Roth* was the constitutionality under the First Amendment of two criminal obscenity statutes. One was a Federal statute (18 U.S.C. § 1461) which made it a crime for anyone to deposit for mailing and delivery obscene books, circulars or advertising. The other was a California statute (West's Ca. Penal Code Ann., 1955, § 311) which made it a crime for any person willfully and lewdly to keep for sale an obscene book or to publish an obscene advertisement of them. The Supreme Court held both statutes constitutional.

The Massachusetts statute before us is essentially the same as the two statutes upheld in *Roth* in that all three make the public distribution of obscene matter a criminal offense. This being so, it must follow as a matter of elementary logic that the Massachusetts statute is also constitutional.

The holding in *Roth* is still the law and is binding upon

this Court. It has not been overruled by *Stanley* or any other case.

In *Stanley* the appellant was indicted, tried and convicted for "knowingly hav[ing] possession of ... obscene matter" in violation of a Georgia statute. The Georgia Supreme Court affirmed, holding it "not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was with 'intent to sell, expose or circulate the same.'" Appellant contended that the Georgia obscenity statute was unconstitutional insofar as it punishes mere private possession of obscene matter. The United States Supreme Court agreed and held that "the mere privative possession of obscene matter cannot constitutionally be made a crime." The Supreme Court takes pains to distinguish the case before it from *Roth* and similar cases in which *public commercial dissemination* of obscene material is involved.

The Court notes (p. 559) that the Georgia statute extended "further than the typical statute forbidding commercial sales of obscene material." It also notes (p. 559) that the "State and appellant both agree that the question here before us is 'whether a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter' is constitutional." The Court points out (pp. 560-561) that neither *Roth* nor any subsequent decision dealt with that question but "dealt with the power of the State and Federal Governments to prohibit or regulate certain *public* actions taken or intended to be taken with respect to obscene matter." (Emphasis supplied.)

And again at p. 567: "But that case [*Roth*] dealt with public distribution of obscene materials and such distribution is subject to different objections." In note 10 on the same page the Court makes reference to the Model Penal Code § 251.4 (American Law Institute, Proposed Official Draft, 1962) which would also make commercial dissemina-

tion of obscene matter a criminal offense. The Court concludes by stating (p. 568):

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

Thus the Supreme Court itself has declared in clear, unambiguous language that the holding in *Roth* has not been overruled by the decision in *Stanley* and is still the law.

Accordingly, on the authority of *Roth*, I would reject as wholly unjustified the plaintiffs' contention that the Massachusetts obscenity statute is unconstitutional on its face.

On the question of abstention the pertinent cases are *Dombrowski* v. *Pfister*, 1965, 380 U.S. 479,[2] and *Zwickler* v. *Koota*, 1967, 389 U.S. 241.[3] In both those cases the statutes under attack were held to be overbroad and susceptible of sweeping and improper application and therefore justifiably attacked on their face as abridging expression protected by the First Amendment. Additionally, though threatened with prosecution, the petitioner in neither case was then in fact being prosecuted for violating the challenged statute and consequently its constitutionality was not being litigated in the State court. In *Dombrowski* there was the added element of bad faith on the part of the State prosecutor, an element certainly not present here. The Court accordingly held that abstention was not appropriate. Since the Massachusetts statute is

[2] The statute under attack was the Louisiana Subversive Activities and Communist Propaganda Control Law.

[3] The statute prohibited the distribution of anonymous handbills critical of political candidates.

not being justifiably attacked on its face as abridging free expression and since the case in the Massachusetts Court has been tried and decided and is now on appeal, it seems to me especially appropriate for this Court to abstain from proceeding to a declaratory adjudication of the constitutionality of the statute until the Supreme Judicial Court shall have heard and decided the appeal. The parties anticipate that this will happen within the next three or four months.

No injunction should issue against the defendant district attorney. He should be left free to prosecute these plaintiffs should they resume the exhibition of the film while their conviction in the Superior Court remains outstanding and their appeals pending.

The plaintiffs have failed to show the existence of the requisite grounds that would justify the issuance of a preliminary injunction:

(1) Since the statute is not unconstitutional on its face and the film is assumed by the Court to be obscene,[4] and has been found to be obscene by the Superior Court, the plaintiffs have failed to establish the probability that they will ultimately prevail in this litigation.

(2) There is no evidence before us that plaintiffs will suffer irreparable injury if they are prevented from showing the film until final disposition of their appeal. There has been no showing of the extent of the monetary loss, if any, that they will suffer if they are not allowed to show the film. We should not concern ourselves with the diminution in the value of the film if its showing is delayed for a substantial period of time. The film is not owned by the plaintiffs, but by Grove Press, Inc.,[5] which

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[4] In its Memorandum of July 15, 1969, this Court said: "[T]he Court . . . will not consider now or at any other time the claim that the film is not obscene, as an evidentiary matter."

[5] The motion of Grove Press, Inc., to Intervene as a party plaintiff was denied by the Court on July 15, 1969.

is not a party to this litigation. Furthermore, there is no evidence of the economic value of the film.

(3) The mere possibility that plaintiffs may be deprived of a constitutional right pending final determination of this case does not amount to the irreparable injury necessary to justify the issuance of the injunction.

Thus, in *Dombrowski v. Pfister*, 380 U.S. 479, 484-485, the Court states:

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

What the majority of this Court is doing today is without precedent. It is declaring that the public, commercialized dissemination of obscene matter to adults, regardless of how lewd and degenerate it may be, is protected expression under the First Amendment. I have found no authority for this proposition either in decided cases or in legislative enactments. On the contrary numerous statutes, both Federal and State, and a multitude of cases decided by the Supreme Court of the United States[6] and by other courts, Federal and State, have consistently denounced and punished as criminal the public, commercialized dissemination of obscene matter.

In my opinion the position taken by the majority of

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[6] See, for example, the cases listed in *Stanley*, supra, notes 5 and 6, at page 561.

this Court is legally unsound and inimical to the public interest. I must therefore dissent.

(s) ANTHONY JULIAN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-665-J

SERAFIM KARALEXIS, JAMES VLAMOS
SYMPHONY CINEMA II, INC., and
FILM DISTRIBUTORS, INC., All of
252 Huntington Avenue, City of Boston,
County of Suffolk, Commonwealth of
Massachusetts,

PLAINTIFFS,

v.

GARRETT BYRNE, as he is the duly elected
District Attorney for Suffolk County,
City of Boston, Commonwealth of Massachusetts,
and Honorable Robert H. Quinn, Attorney
General of the Commonwealth of Massachusetts,

DEFENDANTS.

December 6, 1969

INJUNCTION

This cause came on to be heard upon a motion for a preliminary injunction pending a decision on the merits, and after hearing, and upon the findings and rulings contained in the court's opinion of November 28, 1969, it is hereby ordered, adjudged and decreed as follows:

The defendants, their agents, servants and successors in office, shall not, until further order of this court, proceed against, civilly or criminally, or otherwise interfere with, the plaintiffs Serafim Karalexis, James Vlamos,

Symphony Cinema II, Inc. and Film Distributors, Inc. on account of the showing of a certain moving picture film entitled "I Am Curious (Yellow)." Provided, that this injunction shall not apply if the said picture is advertised in a manner pandering to a prurient interest in sex, or is shown to an audience not warned of its possibly offensive character, or is shown to children under the age of 18 years.

Provided, further, that the prosecution of proceedings connected with the appeal of the plaintiffs from a certain decision against them in the criminal side of the Suffolk Superior Court, short of ordering the execution of sentence or other penalties, is not hereby forbidden.

By the Court,

(s) Bailey Aldrich
Circuit Judge

(s) Raymond J. Pettine
District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE and ROBERT H. QUINN, *Appellants*

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., *Appellees*

On Appeal From the United States District Court for the District of Massachusetts

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1149

GARRETT H. BYRNE and ROBERT H. QUINN, *Appellants*

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., *Appellees*

On Appeal From the United States District Court for the District of Massachusetts

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move that the preliminary injunction issued by the district court on December 6, 1969 (Juris. St. 29-30) be summarily affirmed on the ground that the decision of the court below is plainly correct and that the delay incident to plenary review on the merits will irreparably injure appellees.

QUESTIONS PRESENTED

1. Whether the district court properly issued a preliminary injunction against *future* interferences by law-enforcement authorities with the appellees' exhibition of the motion picture film "I Am Curious (Yellow)" to adults only in an adequately controlled, privately owned theatre on the ground that the applicable Massachusetts obscenity statute was probably unconstitutional for overbreadth under this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

2. Whether the district court was required to abstain from considering the appellees' claim because a local criminal prosecution was instituted against the appellees after the commencement of this action.

STATEMENT

Appellees are exhibitors of motion pictures who have shown the Swedish film "I Am Curious (Yellow)" and wish to show it in the future.[1] The film was held to be constitutionally protected against government suppression in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196 (2d Cir. 1968), a decision which the United States did not seek to have reviewed in this Court. The same film is before this Court in *Grove Press, Inc.* v. *Maryland State Board of Censors*, No. 905, this Term. The court below declined to consider the film's alleged obscenity in this case.

On May 28, 1969 (a Wednesday)—several months after the decision of the Court of Appeals for the

[1] The two corporations own motion picture theatres adjacent to each other in Boston. Appellee Vlamos is president of both corporations and appellee Karalexis is the theatre manager for both theatres.

Second Circuit had become final—the film began to play at appellees' theatres—the Symphony Cinema I and Symphony Cinema II. On the following day, search warrants were obtained by officers of the Boston Police Department from the clerk of a local court for the seizure of the film, and the prints thereof were seized. On May 30, a criminal complaint was filed charging appellee Karalexis with having violated Mass. Gen. Laws, ch. 272, Sections 28A and 32. On the same day, a justice of the local court directed that the prints of the film be returned to the appellees with the understanding that exhibition of the film could continue, provided that no one's privacy was invaded and no minors were admitted to the theatre. Exhibition of the film was resumed on that day. On the following Tuesday—June 3, 1969—appellees were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit, and exhibiting, an obscene motion picture in violation of Sections 28A and 32. The complaint against appellee Karalexis was dismissed on the following day.

On June 14, 1969, appellees instituted this action in The United States District Court for the District of Massachusetts, challenging the constitutionality of the statutes under which they had been indicted on June 3 on a variety of grounds, including the absence of any specific requirement for *scienter*, see *Smith* v. *California*, 361 U.S. 147 (1959). On June 17 and on June 21, an amended complaint and an amendment to the amended complaint were filed. On June 24, 1969, the three-judge district court acted on appellees' request for a preliminary injunction (Appendix A, pp. 1a-3a, *infra*). The court observed that the cited provisions of Massachusetts law "may appear to be unconstitutional on their face in that they make crim-

inal the publication of obscene matter in the absence of knowledge of the content of the publication. [Citation omitted.] The Massachusetts court has construed section 28A, however, implicitly to require proof of scienter. [Citation omitted.] The [Massachusetts] court has not passed upon section 32 in this respect."

The three-judge court then noted that it had been represented in open court that the indictments issued on June 3 did not contain any allegation of *scienter*, and that such an allegation was necessary because otherwise the grand jury might have indicted without having found that element to exist. The court then concluded as follows (p. 2a, *infra*):

> A federal court should be slow to declare a state statute unconstitutional when there be doubt as to an unconstitutional meaning. Particularly should this be true when the state court has, through a past ruling, indicated that it might give the statute an interpretation which made it constitutional. Whatever may be the limits of 28 U.S.C. § 2283, plaintiffs have here full opportunity to obtain a ruling from the state court. By motions to dismiss the indictments on the ground of failure to allege scienter, the filing of which we assume the state court would permit, plaintiffs may seek a construction of the statute. If the court construes the statute in plaintiffs' favor, presumably it will dismiss the indictments. If it construes it as not requiring scienter and denies the motions to dismiss, then we will be free to hold the statute unconstitutional for lack of an essential element, should we so determine, and grant the relief sought herein.

The court below thereupon unanimously issued a temporary injunction (Appendix B, p. 3a, *infra*) enjoining all action by appellant Byrne pursuant to

the indictments of June 3 other than those incident to consideration by the court of an appropriate motion to dismiss. Motions to dismiss were filed by appellees in the State court on June 25, 1969. The motions were not opposed by appellant Byrne and were granted on the same day. The dismissal of the indictments left no local criminal proceedings outstanding against appellees.

On June 30, 1969, appellees returned to the United States District Court with a further amendment to their complaint (Appendix C, pp. 4a-7a, *infra*). They alleged therein that they had been requested to supply to the office of appellant Byrne a print of the film to be used in further investigations and presentations to the grand jury, and that the print had been made available. The amendment further alleged that appellees "do anticipate that further indictments will be sought against them" by appellant Byrne for violation of Mass. Gen. Laws, ch. 272, § 28A. The amendment again challenged the constitutionality of Section 28A, requested that the court declare it to be unconstitutional on its face and as applied to the appellees, and asked that appellant Byrne be enjoined from instituting "any future prosecutions" (paragraph (7)) and "any further prosecutions" (paragraphs (8) and (9)).

Shortly *after* the complaint was filed, the Suffolk County Grand Jury issued indictments against the appellees for violation of Section 28A.[2] On July 15, 1969, the three-judge district court denied appellees' request that the proceedings on the second indictments

[2] Section 32 was not involved in this second set of indictments, possibly because it has never been locally construed as requiring proof of *scienter*.

—begun *after* the filing of the amended complaint—be enjoined (Appendix D, pp. 8a-9a, *infra*). It did, however, provide that the motion for injunctive relief could be renewed "if and when petitioner is convicted in the Superior Court." Appellant had stipulated "that no seizure of the film or interruption with the showing will be made" pending the outcome of the proceedings, and the court added that if the stipulation were renewed in case of conviction, "the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against the petitioner, or for 30 days after verdict, whichever shall first occur."

The court below declined to consider the question whether the film was obscene, but, in the event the case were to return to federal court and in order to aid it in determining whether the statute is unconstitutional on its face or as applied, it invited briefs on several legal issues relating to *Stanley* v. *Georgia*, 394 U.S. 557 (1969).[3]

The trial of appellees on the second set of indictments was held before Chief Judge Tauro (jury being waived) in Suffolk Superior Court between July 15 and July 30, 1969. After taking the case under ad-

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[3] The court's opinion asked counsel to brief the following questions:

> If an adult individual may view obscene material in the privacy of his home,
>
> a) can he purchase obscene material for such purpose?
>
> b) can he invite friends to the viewing?
>
> c) can he go to a private place to view such material?
>
> d) can a group of persons go to such private place?
>
> e) can they go to an adequately controlled public place?

Briefs were submitted by appellees and by Grove Press, Inc. (the distributor), which was invited to participate *amicus curiae*, and the court heard oral argument on these issues

visement, the State judge on November 12, 1969, found the film obscene, and sentenced appellee Vlamos to one year's imprisonment and the other appellees to pay fines. Appellant Byrne thereafter refused to renew the earlier stipulation regarding noninterference with future exhibition of the film *pendente lite* and stated that he would seek additional indictments if exhibition of the film were continued. Appellees then ceased showing the film in Boston, because of the threat of multiple prosecution.

Appellees then returned to the federal district court seeking injunctive relief against *future* prosecutions by appellant Byrne if they resumed exhibition of the picture. In this posture of the case—without interfering with the judgments of conviction entered against appellees on November 12—the majority of the court below on November 28, 1969, issued an opinion in which it determined that Section 28A would probably be declared unconstitutional, after plenary consideration, and that in light of the irreparability of appellees' injury a preliminary injunction would be issued against *future* interference with appellees' exhibition of the film. On December 6, 1969, the order was issued,[4] and it was stayed by this Court, pending the timely filing and disposition of an appeal, on December 15, 1969.

ARGUMENT

Demonstrating more than ample sensitivity to considerations of federalism, the court below refused on June 24, 1969, and on July 15, 1969, to interfere with State court proceedings—the first time with indictments (subsequently dismissed) filed *prior* to the commencement of this action and the second time with indictments which were issued *after* the appellees'

[4] Appellant Quinn was also added as a party on that date.

amended complaint was filed. Finally—after permitting the State courts to conclude an extensive trial which resulted in a sentence of a year's imprisonment for the exhibition of a motion picture which was rated as one of "The Twenty Best Films of 1969" by the *New York Times* film critic[5]—the court below considered the constitutionality of the underlying State statute, found it probably deficient, and issued an interlocutory injunction under which *future* interference with the film's exhibition was enjoined. This order did no more than permit the film to be shown while plenary consideration could be given by the federal court to appellees' request for a declaratory judgment and appellate remedies could be pursued with respect to the State conviction. We submit that that decision by the court below was plainly correct, reflected a proper weighing of the probability of success in the

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[5] See *New York Times*, Dec. 28, 1969, Sec. D, pp. 1, 13 and 26. Other serious commentary on the film appears in Smith, C. B., "I Am Curious—Yellow and Blue," *Film Quarterly* Vol. 22, No. 4 (1969); Steele, R., "I Am Curious—Yellow," *Friends Journal*, Vol. 15, No. 16 (1969); Weinraub, B., "Obscenity or Art," *N. Y. Times*, July 27, 1969, P. 24; Simon, J., "Getting Furious Over Curious," *N. Y. Times*, February 9, 1969, p. 1; Steele, R., "Esthetique du Mal," *Film World*, Spring, 1970; Kelman, K., "Imaginations," *Film Culture*, Spring 1964 at pp. 16-19, Schickel, R., "Review" in *Life*, March 21, 1969; Cox, H., "Review" in *Tempo*, Vol. 1, No. 17 (1969); Schickel, R., "It Takes Nothing But the Heart", *Life*, Atcheson, R., "Review", *Holiday*, December, 1968; Gross, L., "Review", *Look*, April 29, 1969; Morgenstein, Joseph, "Review", *Newsweek*, March 24, 1969, p. 114; Hatch, R., "Review", *The Nation*, March 24, 1969; West, A., "Review", *Vogue*, April 15, 1969; "Review", *Time*, March 14, 1969; Alpert, H.; "Review", *Saturday Review*, March 15, 1969; Kauffmann, S., "Review", *The New Republic*, March 15, 1969; Gilliatt, P., "Review", *The New Yorker*, April 5, 1969, p. 97; Trotta, G., "Review", *Harper's Bazaar*, June 1969; Aarons, Leroy, "Answering Curious Questions", *Washington Post*, March 11, 1969.

federal court action and the irreparability of harm to the appellees, and should be affirmed summarily.

Before moving to the reasons underlying the above conclusion, we draw the Court's attention to the interrelationship between this case and *Grove Press, Inc.* v. *Maryland State Board of Censors*, No. 905, this Term. That case involves the censoring as obscene of the same film which gave rise to this case, and appellants in No. 905 (the distributor and exhibitor of the film) have urged, *inter alia*, that the Court summarily reverse the decision being appealed in that action, on the authority of *Redrup* v. *New York*, 386 U.S. 767 (1967). Were the Court to adopt that course —and thereby agree with the Court of Appeals for the Second Circuit that "I Am Curious (Yellow)" is constitutionally protected and non-obscene—the present action would become moot. For, in such event, the appellants or anyone acting on their behalf would be constitutionally prohibited from doing what the appealed order prohibits—*i.e.*, proceeding civilly or criminally against, or otherwise interfering with, appellees on account solely of their exhibition of the film to adults in a non-obtrusive and non-"pandering" manner (compare Juris. St. 29-30)—irrespective of the validity of the rationale given by the court below in support of its order. If the Court were, therefore, to decide upon the first course proposed by the appellants in No. 905, the appropriate disposition of this action would be to direct that the judgment below be vacated and the cause be dismissed as moot.

1. The decision of the court below that the First and Fourteenth Amendments, as interpreted in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), probably bar State interference with exhibition of the motion picture at

issue here in a privately owned, adequately controlled theatre from which minors are excluded, is a proper and valuable interpretation of this Court's recent decisions in the obscenity area. The Court's opinion in *Stanley* held explicitly that the First Amendment (as made applicable to the States by the Fourteenth) secures both "the right to receive information and ideas" (394 U.S. at 564) and "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy" (*ibid.*). Recognition of this double-barreled right was interpreted by the Court to establish an individual's constitutionally protected "right to read or observe what he pleases." 394 U.S. at 565 and 568.

This Court in *Stanley* marked a clear line between "the power of the State and Federal Governments to prohibit or regulate *certain public* actions taken or intended to be taken with respect to obscene matter" (394 U.S. at 561; emphasis added) and the authority of government "to protect the individual's mind from the effects of obscenity" (394 U.S. at 565). While reaffirming its holding in *Roth* v. *United States*, 354 U.S. 476 (1957), that governmental police power of the former type may legitimately be exercised with respect to obscenity, the Court in *Stanley* determined that there was no room under the First Amendment for government efforts "to control the moral content of a person's thought." 394 U.S. at 565.

The court below correctly concluded, on its preliminary consideration of the legal issues, that Section 28A of Mass. Gen. Laws, ch. 272, was unconstitutionally overbroad in that it ranged impermissibly into the field of "thought control." For it was entirely clear from the stipulated facts that there was no possible State interest in interfering with appellees' exhibition of

the film than the one prohibited by *Stanley* v. *Georgia*. The majority opinion below observed: "Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginzburg* v. *United States*, 1966, 383 U.S. 463. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter." Juris. St. 17.

The court below properly concluded on the stipulated facts, that the law under which State prosecutions might be brought involved none of the "valid governmental interests" with respect to the regulation of obscenity which had formed the basis for the Court's decision in *Roth*, and which were explicitly recognized in *Stanley* and in this Court's *per curiam* opinion in *Redrup* v. *New York*, 386 U.S. 767, 769 (1967), as interests capable of being pursued consistently with constitutional requirements.[6] As the *Stanley* opinion stated: "[*Roth*] dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg* v. *New York*, *supra*,

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[6] In *Redrup*, the Court enumerated the legitimate interests as follows: "... a specific and limited state concern for juveniles ... an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it ... [and] the sort of 'pandering' which the Court found significant in *Ginzburg* v. *United States*, 383 U. S. 463." 386 U. S. at 769. See the analysis of *Redrup* and of the development of the "assault" theory in deGrazia, ***Censorship Landmarks*** (N.Y., R.R. Bowker, 1969) at pp. xxix-xxxii.

or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York* . . . . No such dangers are present in this case." And, no such dangers were present in the case below. The case presented the bald question of whether the Commonwealth of Massachusetts might enforce its obscenity law to prevent willing adults from seeing a film in a private motion picture theatre—"adequately controlled" as to juveniles, pandering, and possible intrusions on privacy.

Under the narrowest reading of *Stanley*, it is indisputably clear that any adult who wishes to view "I Am Curious (Yellow)" in his library or basement has a constitutionally secured right to "receive" (394 U.S. at 564) and to view it. The conclusion of the majority below—"[i]f a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library" (Juris. St. 19-20)—follows inexorably unless the First Amendment protects only the limited and privileged few who are able to afford to purchase films.

Even before *Stanley*, there was a developing consensus of legal scholars on the *Stanley* principle—*i.e.*, the simple and straightforward proposition that governmental interference with the distribution or receipt of written, printed or artistic material is warranted only as protection against unwanted transmissions to unwilling audiences and against assaults on private sensibilities, or as protection for juveniles. As *for willing adults*, the First Amendment preserves the "right to receive information and ideas, regardless of their social worth." 394 U.S. at 564. One recent commentator has stated the rule as follows: ". . .

obscenity is vested with constitutional protection subject to divestment upon a finding of distribution to minors or exposure to an unwilling (captive) audience." Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 Supreme Court Review, 203, 217 (1969).[7]

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[7] See also Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 Mich. L. Rev. 185, 229, 232 (1969):

> "... [T]he state may not enact legislation which has as an objective the protection of adults from themselves."
>
> "... it seems impossible to justify recognition of a legitimate state interest in protecting the citizen's sensibilities with regard to sexual expression just as such an interest cannot be justified when religious or political expression is at issue."

Morreale, *Obscenity: An Analysis and Statutory Proposal*, 2 Wisc. L. Rev. 421, 455 (1969):

> "... the only clearly legitimate interest a state can protect by censorship of obscene representations to adults, is the interest of persons to avoid unwilling confrontation with obtrusive, obscene representations."

Elison and Graham, *Obscenity: A Compromise Proposal*, 30 Mont. L. Rev. 133, 134 (1969):

> "Any material, reproduction, object of art or what have you should be available for purchase by the adult population with the only restriction being that it cannot be forced upon them."
>
> "Adults who wish to be exposed to offensive material may risk corrupting themselves. This is a minor concession to free speech and to a more practical solution to the problem of morally offensive material."

The Supreme Court, 1968, 83 Harv. L. Rev. 7, 147, 153 (1969):

> [Obscenity may be banned] "only when it creates a nuisance to others, when it intrudes upon their own autonomous monitoring of their emotional and intellectual intake .... In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will."

Recent lower-court State and federal decisions have followed a similar approach to *Stanley*. See, *e.g.*, *United States* v. *Thirty-Seven Photographs*, U. S. Dist. Ct. C. D. Calif., Civil No. 69-2242-F (January 27, 1970)[8]; *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), *prob. jurisd. noted*, No. 565, this Term (December 8, 1969); *California* v. *Leavens*, Munic. Ct., Fresno Judicial District, Calif., Nos. 400,000 and 40,415 (February 4, 1970) (alternative holding).

The rule advanced in *Stanley*, as applied by the court below to the stipulated circumstances of this case, casts the law of obscenity regulation in a form which removes many of the difficulties surrounding its past application, and brings it into conformity with the larger constitutional principles of freedom of expression. For these reasons, the judgment below should be affirmed.

2. The court below correctly denied the request that it "abstain" from passing on the constitutionality of the Massachusetts statute—inasmuch as the anti-injunction statute (28 U.S.C. 2283) plainly was inapplicable and because this Court's decisions regarding the "abstention" doctrine required the court below to consider the merits of the complaint. See Juris. St. 20-21.

(a) This Court noted in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2 (1965), that the prohibition of 28

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[8] In *Thirty-Seven Photographs*, the court determined that 19 U.S.C. 1305 was unconstitutional as applied to the importer of 37 photographs for incorporation "in a book for distribution." The court held that the statute "prohibits a person who may constitutionally view pictures of [*sic*] the right to receive them." In reasoning paralleling that of the court below, it said, "The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent."

U.S.C. 2283 applies only to pending "proceedings"—*i.e.*, to State court actions which are *in esse* at the time of the filing of the federal complaint. In this case, the only "proceedings" which were instituted prior to the filing of the initial complaint were the indictments of June 3, 1969, and they were subsequently dismissed and are not in issue here. At the time of the filing of appellees' last amendment to their complaint on June 30, 1969, there were no outstanding criminal prosecutions. The amendment (reprinted in full at pp. 4a-7a, *infra*) requested prospective relief only. Like the complaint in *Dombrowski*, it sought injunctive relief against *threatened prosecutions to be instituted in the future;* it did not ask the federal court to interfere with any previously instituted State proceeding. We emphasize this fact particularly because two Justices of this Court apparently construed the facts otherwise, in passing on appellants' application for a stay pending appeal. See *Byrne* v. *Karalexis*, Application for Stay, decided December 15, 1969, 90 S. Ct. 469. The chronology documented in our Statement, pp. 2-7, *supra*, makes clear that the court below had *not* "stepped into the middle of a state criminal prosecution" (Opinion of Mr. Justice Black) and that the action did not violate the rule "that federal courts refrain from interfering in pending state criminal prosecutions" (Opinion of Mr. Justice Black, quoted in the Opinion of Mr. Justice Stewart). Indeed, as we demonstrate at pp. 21-22, *infra*, the court below acted in a factual context in which there existed "the threat or actuality of repetitive prosecutions for exhibition of the film in question"—referred to by Mr. Justice Stewart as a justification for intervention in his separate opinion.

(b) The court below was not required to "abstain" any longer than it did under the judicially created abstention doctrine of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), applied most recently by this Court in *Reetz* v. *Bozanich*, No. 185, this Term, decided February 25, 1970. As the facts recited in our Statement (pp. 2-7, *supra*) demonstrate, the court below did, in fact, "abstain" at two earlier junctures in this action: On June 24 it deferred decision on the issue whether an allegation of *scienter* was constitutionally necessary in an indictment alleging violations of the obscenity statute. That issue was resolved by the State court's dismissal of those indictments for failure to allege *scienter*.

Thereafter, on July 15, 1969, the court below refused to enjoin criminal proceedings instituted *after* the filing of appellees' complaint, even though the court must have had substantial doubts regarding the constitutionality of the underlying statute. The purpose of this action was plainly to permit the State trial court to pass, in the first instance, on the constitutional challenge.[9] Once that claim was rejected and the appellant refused to renew his agreement under which exhibition of the film could continue *pendente lite*, the federal court was faced squarely with a constitutional issue of substantial magnitude—whether this film could be effectively suppressed by threats of future prosecutions under a constitutionally vulnerable local statute. Under the principles firmly established by this

[9] We note, in passing, that the *Stanley* v. *Georgia* argument was impliedly rejected by the Massachusetts Supreme Judicial Court in *Commonwealth* v. *State Amusement Corp.*, 248 N. E. 2d 497, which was decided on May 28, 1969, after the constitutional claim was made in oral argument (held shortly after the *Stanley* decision).

Court's unanimous holding in *Zwickler* v. *Koota*, 389 U.S. 241 (1967), the court below was obliged to reach and decide the merits of the appellees' claim and reject the request to "abstain."

Zwickler involved—as does this case—a suit brought to declare a statute void under the First Amendment for "overbreadth" and to enjoin *future* prosecutions. Here, as in *Zwickler*, federal court jurisdiction was invoked under the Civil Rights Act of 1871, 42 U.S.C. 1983, and that made it the duty of the court below to consider the merits of the claim unless "special circumstances" (389 U.S. at 248, quoting from *Propper* v. *Clark*, 337 U.S. 472, 492 (1949)) warranted "abstention."[10]

The holding of *Zwickler*—that a claim of "overbreadth" violative of the First Amendment cannot be shunted aside by a federal court on the possibility that State courts may construe the challenged statute narrowly (389 U.S. 249-250)—fully disposes of the assertion made here by appellants that the Massachusetts Supreme Judicial Court may construe the local statute to obviate the constitutional problem presented by its conflict with *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (Juris. St. 10-11). Indeed, even under the standards applied in the separate concurring opinion of Mr. Justice Harlan in *Zwickler* (389 U.S. at 255-257), "abstention" is inappropriate here. For, as the

[10] Appellants' citation of *Cameron* v. *Johnson*, 390 U. S. 611 (1968) (Juris. St. 7), is wholly inapposite since the only issue in *Cameron* on which this Court held it appropriate for the federal courts to stay their hand was whether the plaintiffs were the subjects of good-faith erroneous application of a *constitutional* statute. This Court, in fact, passed on the claim that the statute was unconstitutionally overbroad—the very issue on which the court below found for appellees. 390 U. S. at 616-617.

majority below noted, it is "difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness" (Juris. St. 20). Hence there is no real possibility that "the federal constitutional issue might be mooted or 'presented in a different posture' by a state court determination of pertinent state law." 389 U.S. at 256. Nor can there be any claim here that the exercise of federal court jurisdiction "would disrupt a state administrative process . . . interfere with the collection of state taxes . . . or otherwise create needless friction" between the enforcement of state and federal policies." *Ibid.*

To be sure, there is presently pending a State court proceeding in which the constitutionality of the challenged statute and its applicability to the film "I Am Curious (Yellow)" are at issue. But that proceeding was instituted *after* the federal action commenced, and the court below demonstrated its sensitivity to considerations of federalism by refusing to interfere even with the subsequently instituted proceeding in order to give the trial court an opportunity to consider the constitutional and statutory issues. Surely the reluctance of the court below to take the legally permissible step of enjoining State criminal proceedings brought *after* the complaint was filed cannot be given the effect of precluding the more limited relief granted below—*i.e.*, an injunction against other future prosecutions.

Moreover, as this Court squarely held in *Zwickler* (389 U.S. at 251), reaffirming the principle applied in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), "abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim." Nor would it have been appropriate for the

court below to deny relief to the appellees on the possibility that a Massachusetts appellate court might agree with the Court of Appeals for the Second Circuit and with a New Jersey trial court [11] which had found the film not obscene. As Judge Aldrich noted, it would be anomalous to "postpone permitting plaintiffs to exhibit their film on the ground that, after all, it is *not* obscene." Juris. St. 21, n. 11 (emphasis in original).

There is, therefore, at least as much justification for federal court intervention here—to vindicate constitutional rights which will otherwise be destroyed—as in circumstances such as those presented in *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), now pending in this Court, No. 565, this Term. Here, as in *Stein* and *Dombrowski*, the local statute is attacked on its face as abridging free expression (380 U.S. at 489), and, as our Statement demonstrates, the court below went out of its way to avoid "needless friction" with State courts (*Reetz* v. *Bozanich*, No. 185, this Term, decided February 25, 1970, quoting from *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500) by deferring its own decision so that "the first judicial application" to appellees (*Reetz* v. *Bozanich*, *supra*) of the challenged statute should be by a State court.

The course followed by the court below is consistent with that recently taken by the three-judge district court in *Milky Way Prods., Inc.* v. *Leary*, 305 F. Supp. 288 (S.D.N.Y. 1969), affirmed *per curiam* by this Court on February 27, 1970, No. 998, this Term. In

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[11] *Lordi* v. *UA New Jersey Theatres, Inc. and Grove Press, Inc.*, Superior Court of New Jersey Chancery Division, Essex County (Civil No. C-737-69), decided December 9, 1969.

Milky Way, the district court considered complaints requesting declaratory and injunctive relief against the enforcement of local obscenity statutes. The court denied injunctive relief solely on the ground that criminal proceedings had been pending for three or four months in the State courts and the plaintiffs had made no effort to press their constitutional claims in those forums. 305 F. Supp. at 292. The court held, however, that under the *Zwickler* decision "the subjects of vagueness and overbreadth . . . are permissible for declaratory relief." *Id.* at 293. It then went on to consider the constitutional claims on their merits—as did the court below in this case.

Under the principles of *Zwickler* v. *Koota*, *supra*, and the legal doctrines refined in this Court's "abstention" decisions, the court below was and continues to be obliged to pass on the merits of appellees' request for a declaratory judgment that the Massachusetts statute violates the First and Fourteenth Amendments for overbreadth. Before making such a final determination, the court below considered the question of interlocutory relief—of whether to grant a preliminary injunction. In light of its views regarding the likelihood of success in the lawsuit and the irreparability of injury, it granted the temporary injunction at issue here.

That relief was fully justified by the record before the court. It was not necessary for the court to take extensive evidence on the harm accruing to appellees if relief were denied. It is a matter of common and general knowledge—not really subject to dispute—that the popularity of contemporary motion pictures which are nationally distributed, reviewed, and advertised is fleeting, and that a delay—as in this case—of months

or years in the exhibition of a picture will seriously diminish box-office receipts in an amount not subject to ready calculation.

It was not necessary for the court below to receive evidence on the "chilling effect" of an unconstitutionally overbroad statute. It was obvious to the court—and this became even more apparent once the State court proceeding resulted in a conviction and jail term—that the possibility of criminal penalties would effectively stifle the exhibition of the film even by those who were confident that the statute could not withstand constitutional challenge or that the film would ultimately be adjudged constitutionally secure against obscenity proceedings. Nor are film exhibitors the only or chief interests affected. The threat of further prosecutions, by dissuading a film's exhibitors, also deprives each member of the adult community of his right to see the film, his "right to read or observe what he pleases." *Stanley* v. *Georgia, supra.* For in this area, as surely as in the factual circumstances of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), vindication of First Amendment rights should not turn on the "improbability of successful prosecution . . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. To deny injunctive relief on the basis that rights could adequately be vindicated in the many State proceedings which would follow exhibition of the film would be to violate another principle fixed by this Court in *Dombrowski*—"that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious: aimed at hammering out the structure of the

statute piecemeal, with no likelihood of obviating similar uncertainty for others." 380 U.S. at 491.

This Court need not look beyond its own docket to see how extensive the harm may be if federal courts are barred from granting injunctive relief in circumstances such as those presented here. In *Shaw International Theatres, Inc.* v. *Municipal Court*, an Application for Stay has been filed to prevent 107 prosecutions by local officials in California against exhibitors of the film "I Am Curious (Yellow)." The probability of multiple prosecutions and harassment by local prosecutors if federal courts are disabled from granting injunctive relief is, as the California experience demonstrates, very high. Indeed, after the Boston proceedings, criminal prosecutions were instituted in various Massachusetts communities as a result of exhibition of the film. *E.g.*, Springfield District Court, No. SW 121 (October 29, 1969); Hampshire District Court, Complaints Nos. 7121, 7122 (November 5, 1969). The film is presently showing nowhere in the State of Massachusetts. In several other jurisdictions, federal district courts have granted injunctions against local prosecutions and harassment by local prosecutors of exhibitors of "I Am Curious (Yellow)" precisely because of the "chilling" effect of proceedings of this kind. See *Grove Press, Inc.* v. *Blackwell*, E. D. Mich., No. 3369 (September 5, 1969); *Lake City Cinema, Inc.* v. *Austin*, M. D. Fla., No. 70-15-Civ-J (January 13, 1970).[12]

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[12] See also Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 548-549 (1970):

> "Professor Freund, for example, believes that the existence of an affirmative remedy for a distributor should embrace the right to enjoin any criminal prosecutions for interim sales,

CONCLUSION

The coercive impact of State prosecutorial threats—especially when coupled with a stiff prison sentence meted out by a State court (in a subsequently instituted proceeding) to an exhibitor who showed the film on the basis of a high federal court's adjudication of its non-obscenity—is manifestly as effective a brake on the circulation of a film's images and ideas as the edict of any formal censorship board. The threats of the State prosecutor were subject to no judicial review and no adversary hearing. Yet they were as effective in blotting out the rights of the people of the State to see the film as the banning by the Maryland Board of Censors in No. 905. It is imperative to the security of First Amendment rights that the federal courts be enabled to prevent this kind of wholesale future abridgement of such rights by State law enforcement officials, particularly in the area of the performing arts. For, as everyone familiar with these arts knows, timeliness is of the essence in determining the acceptability and success of any particular work of art. In this realm the delay incident to extended judicial proceedings is nothing less than the equivalent of a death warrant.—

---

since each interim sale would, of course, be a potential separate criminal offense [Footnote omitted]. In effect, the Constitution requires not only a prospective remedy but such coercive relief as is necessary to ensure protection of the first amendment right. This argument seems sound. The critical point is that the first amendment must guarantee not simply some prospective relief, but relief fully adequate to protect first amendment interest. The availability of relief with respect to interim sales, moreover, should not depend upon a substantial allegation that the prosecutor in fact intends multiple prosecutions. A distributor should not be at the mercy of the prosecutor and the changing pressures which influence prosecutorial discretion."

The court below properly weighed the need for preliminary injunctive relief in light of the harm which would surely result if appellees and other motion picture exhibitors who wished to show "I Am Curious (Yellow)" were put to the defense of criminal prosecutions under the challenged Massachusetts statute. What cannot be forgotten in the First Amendment area is that with motion pictures, as with books, "self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith* v. *California*, 361 U.S. 147, 154 (1959); see also *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 681 (1968). The stark fact is that appellees and other film exhibitors in Massachusetts are not showing "I Am Curious (Yellow)" today because they have been threatened with criminal prosecution such as that already endured by these appellees under the second set of indictments, pursuant to a probably unconstitutional law. This form of government-instigated self-censorship is what the First Amendment prohibits, and it was to avoid this evil that the court below issued the order which is the subject of this appeal. Its

action was well-founded in law, reason and policy and should be summarily affirmed by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 69-665-J

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC. and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, City of Boston, County of Suffolk, Commonwealth of Massachusetts, *Plaintiffs*

v.

GARRETT BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, *Defendant*

Before ALDRICH, Circuit Judge, and JULIAN and PETTINE, District Judges

Ruling on Plaintiffs' Application for a Preliminary Injunction
June 24, 1969

In this three-judge court case plaintiffs seek a declaration that Mass. Gen. Laws c. 272, §§ 28A and 32, are unconstitutional. Although the allegations are not that simple, plaintiffs may be said to allege two basic grounds. The first is that their moving picture, "I Am Curious (Yellow)," was seized without an adversary preliminary hearing in alleged violation of their First Amendment rights. Neither statute makes any provision covering this matter. The seizure was effected as a result of a search warrant issued on the basis of an affidavit. We do not recognize, nor are we asked to recognize, *in limine* jurisdiction to vacate improperly issued search warrants, if this one be assumed to be such. The statutes are not unconstitutional merely because the prosecution conducted, if it did, an improper search for evidence.

Secondly, sections 28A and 32 may appear to be unconstitutional on their face in that they make criminal the publication of obscene matter in the absence of knowledge of the content of the publication. *Cf. Smith v. California*, 1959, 361 U.S. 147. The Massachusetts court has construed section 28A, however, implicitly to require proof of scienter. *Demetropolos v. Commonwealth*, 1961, 342 Mass. 658. The court has not passed upon section 32 in this respect.

It was stated in open court that the indictments pending against plaintiffs in the state Superior Court do not contain an allegation of defendants' knowledge of the content of the picture. If the statute impliedly contains such a requirement we would suppose that it should be alleged, for in the absence of such allegation the grand jury might have indicted without finding probable cause as to that element of the offense.

A federal court should be slow to declare a state statute unconstitutional when there be doubt as to an unconstitutional meaning. Particularly should this be true when the state court has, through a past ruling, indicated that it might give the statute an interpretation which made it constitutional. Whatever may be the limits of 28 U.S.C. § 2283, plaintiffs have here full opportunity to obtain a ruling from the state court. By motions to dismiss the indictments on the ground of failure to allege scienter, the filing of which we will assume the state court would permit, plaintiffs may seek a construction of the statute. If the court construes the statute in plaintiffs' favor, presumably it will dismiss the indictments. If it construes it as not requiring scienter and denies the motions to dismiss, then we will be free to hold the statute unconstitutional for lack of an essential element, should we so determine, and grant the relief sought herein.

Under the circumstances we shall issue a temporary injunction restraining the prosecution of the state court

proceedings pending further order of this court other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence.

/s/ BAILEY ALDRICH
/s/ ANTHONY JULIAN
/s/ RAYMOND J. PETTINE

APPENDIX B

Temporary Injunction
June 24, 1969

After due notice and hearing, and pursuant to this Court's ruling filed this day on the plaintiffs' application for a temporary injunction, it is hereby ordered that pending further order of this Court the defendant, Garrett Byrne, as he is the District Attorney for the County of Suffolk, Commonwealth of Massachusetts, be and he is hereby restrained from prosecuting the indictments pending against the plaintiffs herein in the Superior Court in and for said County, being criminal cases numbered 42587 through 42592, other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence.

/s/ .....

/s/ .....

/s/ .....

APPENDIX C

Motion To File an Amendment to Amended Complaint—II (Following Dismissal of Original Indictments in Suffolk Superior Court)

Plaintiffs move the Court for leave to file a further amendment to their amended complaint, said amendment attached hereto and titled AMENDMENT TO AMENDED COMPLAINT—II (Following Dismissal of Original Indictments In Suffolk Superior Court).

Attorney for Plaintiffs,

.....

Herbert S. Swartz
1330 Beacon Street
Brookline, Massachusetts

Amendment to Amended Complaint—II (Following Dismissal of Original Indictments in Suffolk Superior Court)

Now come the plaintiffs in the above matter and hereby move that the following allegations be added to Page 6 of their Amended Complaint, as follows:

(17) Following hearing of this case before a three-judge court, the said three-judge court on Tuesday, June 24, 1969, did issue a temporary restraining order against the pending state indictments as aforesaid.

(18) The attorney for the plaintiffs herein, the defendants in Suffolk Superior Court, did make a motion in Suffolk Superior Court before Judge Tauro on Wednesday morning, June 25, 1969, to have the pending indictments dismissed. This motion was assented to by the Commonwealth and said indictments have now been dismissed, being all of the indictments set forth as aforesaid in this Complaint.

(19) That request has now been made to the attorney for the plaintiffs herein by the Office of the Suffolk County District Attorney that the said attorney make available to the Office of the Suffolk County District Attorney one print of the motion picture "I Am Curious (Yellow)." This print will be used for any further investigations to be made by the Office of the Suffolk County District Attorney, and for further use if necessary if presentation is made to the Grand Jury sitting for and of the County of Suffolk for the return of indictments against your plaintiffs herein, similar to the original indictments for which this Complaint was brought. The attorney for the plaintiffs herein has made available to the Office of the Suffolk County District Attorney one print of the motion picture "I Am Curious (Yellow)," and in furtherance of the request made by the Office of the Suffolk County District Attorney, this print may be used for whatever purposes are necessary at trial of the plaintiffs herein, if indictments are returned against them in Suffolk County by the Grand Jury.

(20) On information and belief, the plaintiffs herein say that they do anticipate that further indictments will be sought against them by the Office of the Suffolk County District Attorney for alleged violations of Section 28A of Chapter 272 of the Massachusetts General Laws. That prosecution for an offense under Section 28A would require that the defendants "know the work to be obscene," *Demetropolos* v. *Commonwealth*, 342 Mass. 658 (1961).

(21) That in reliance upon *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), the Massachusetts Supreme Judicial Court still follows the criteria set up in that case for the constitutional definition of obscenity—(1) That the dominant theme of the work appeals to a prurient interest in sex; (2) That the work is patently offensive to contemporary community standards of sexual representation or

description; and (3) That the work is utterly without social value. See *Commonwealth* v. *State Amusement Corporation,* Paragraph 10 of the Amended Complaint, *supra.*

* * *

II

The plaintiffs in the above matter further and hereby move this Honorable Court to amend their Complaints by deleting Prayers (5) and (6), originally on Page 8 of their Amended Complaint, as added to it by the Amendment to the Amended Complaint, and that following deletion of said Prayers (5) and (6), the following prayers be added in their place as follows:

(5) That this Court declare and say that Section 28A of Chapter 272 of the Massachusetts General Laws is unconstitutional on its face, and unconstitutional in its application to the plaintiffs herein, all in accordance with Title 28 U.S.C., Section 2201.

(6) That this Court declare and say that the motion picture "I Am Curious (Yellow)" is not obscene within the constitutional definition of obscenity as set forth by the United States Supreme Court in *Redrup* v. *New York,* 386 U.S. 767 (1967). See also *Books, Inc.* v. *United States,* 385 F. 2d 935 (1 Cir. 1966), rev'd 388 U.S. 449 (1967).

(7) That this Court restrain any future prosecutions of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene" within the terms of Section 28A of Chapter 272, for the reason that there is no way that any future defendant in such prosecution could "know the work to be obscene."

(8) That any further prosecutions of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene" and therefore violative of Section 28A of Chapter 272 of Massachusetts General Laws be re-

strained until such time as the Massachusetts courts affirm that the standards for finding a work obscene within the constitutional definition of obscenity as set forth in *Redrup v. New York, supra,* are that—(1) That the work was being shown to those under the age of 18; (2) Or that the work was an invasion of privacy; or (3) That the work was being advertised in a "pandering" manner.

(9) That this Court issue an injunction restraining any further prosecutions of the plaintiffs herein for the showing of the motion picture "I Am Curious (Yellow)" on the grounds that any prosecution is "without hope or success," in that given the decision of the Second Circuit, no prosecution could hope to prove that this film is "utterly without social value" or that it is "patently offensive to contemporary community standards of sexual representation or description," interpreting the word "community" as implying a *national* standard. See *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Manual Enterprises v. Day*, 370 U.S. 478 (1962); and *In re Gianini*, 72 Cal. Rptr. 655 (1968).

(10) For such other and further relief as this Court shall deem essential or proper in accordance with Equity and Law.

Plaintiffs, Serafim Karalexis, James Vlamos, Symphony Cinema II, Inc., and Film Distributors, Inc.,

By their Attorney,

/s/ .....
Herbert S. Swartz

APPENDIX D

Memorandum and Rulings on Motion To Further Amend Complaint, on Motion To Intervene, and on Motion for Preliminary Injunction

July 15, 1969

The motion to further amend the complaint is allowed.

The motion for leave to intervene is denied. (Proposed intervenor may file an amicus brief at such times as briefs may be appropriate.)

The motion for a temporary injunction is denied at this time, subject to renewal if and when petitioner is convicted in the Superior Court. If petitioner is convicted and the prosecution offers to renew the present stipulation, that no seizure of film or interruption with the showing will be made, the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against the petitioner, or for 30 days after verdict, whichever shall first occur.

Although the court has allowed the motion to further amend, it will not consider now or at any time the claim that petitioner's film is not obscene, as an evidentiary matter. The court may consider ruling on the question whether the statute is unconstitutional on its face, or whether it is unconstitutional to prosecute an obscene publication not conspicuously or pruriently advertised and not available to minors.

The court presently invites briefs on the following questions:

If an adult individual may view obscene material in the privacy of his home,

a) can he purchase obscene material for such purpose?

b) can he invite friends to the viewing?

c) can he go to a private place to view such material?

d) can a group of persons go to such private place?

e) can they go to an adequately controlled public place?

/s/ Bailey Aldrich
/s/ Anthony Julian
/s/ Raymond J. Pettine

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts;

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1149

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

Opinion Below

The opinion of the United States District Court for the District of Massachusetts (App. 31-43) is reported at 306 F. Supp. 1363.

Jurisdiction

The judgment and opinion of the United States District Court for the District of Massachusetts authorizing the issuance of a preliminary injunction was entered on November 28, 1969. The preliminary injunction was issued on December 6, 1969. A timely Supplemental Notice of Appeal was filed on December 24, 1969, and a Jurisdictional Statement was filed with the Clerk of this Court on February 4, 1970. This Court noted probable jurisdiction on March 23, 1970. Jurisdiction is invoked under 28 U.S.C. 1253.

Questions Presented

1. Whether a state may, consistent with First Amendment considerations, prohibit commercial distribution of obscene and pornographic material.

2. Whether, in the circumstances of this case, the court below abused its discretion in issuing a preliminary injunction enjoining enforcement of a state law prohibiting commercial distribution of obscene and pornographic material.

Statute Involved

Mass. Gen. Laws, ch. 272, §28A, provides:

> Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibi-

tion, loan or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction.

Statement

On June 3, 1969, the appellees were indicted by the Suffolk County Grand Jury of possessing with intent to exhibit, and exhibiting, an obscene film—"I Am Curious (Yellow)"—in violation of Mass. Gen. Laws, ch. 272, §§28A and 32, respectively. On or about June 17, 1969, appellees filed an Amended Complaint,[1] and Amendments to that Amended Complaint, in the United States District Court for the District of Massachusetts seeking, *inter alia*, to enjoin future prosecutions of the film, and to declare prosecutions in connection with the showing of that film and the statutes (Mass. Gen. Laws, ch. 272, §§28A, 32) unconstitutional on their face (App. 15-20, 24-28).[2] On June 24, 1969, a three-judge district court temporarily enjoined the prosecution on the ground that the indictments did not allege *scienter* (App. 21-23). On June 25, 1969, the Suffolk County Superior Court, with the assent of the district attorney Garrett H. Byrne, dismissed the indictments. On or about June 30, 1969, appellees filed an amendment to their Amended Complaint in which they alleged that they had sufficient cause to believe that new indictments would be returned, and re-

[1] The original Complaint (App. 6-13) was withdrawn by appellees prior to the filing of a response by appellant, Garrett H. Byrne.

[2] Jurisdiction was invoked under the provisions of the Civil Rights Act (42 U.S.C. 1983) and the Declaratory Judgment Act (28 U.S.C. 2201).

newed their request that appellant Garrett H. Byrne be enjoined from prosecuting in connection with the showing of the film (App. 25-28). Thereafter, the Suffolk County Grand Jury returned new indictments charging all appellees with possessing, with intent to exhibit, obscene matters—the film, "I Am Curious (Yellow)"—in violation of Mass. Gen. Laws, ch. 272, §28A. On July 15, 1969, the court below, after a hearing, denied the renewed request for a preliminary injunction, stating (App. 29):

> The motion for a temporary injunction is denied at this time, subject to renewal if and when petitioner is convicted in the Superior Court. If petitioner is convicted and the prosecution offers to renew the present stipulation, that no seizure of the film or interruption with the showing will be made, the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against petitioner, or for 30 days after verdict, whichever shall first occur.

On November 12, 1969, the appellees were convicted in the Suffolk County Superior Court.[3] At the present time, exhibition of the film has been discontinued, and appellants have not agreed that appellees may exhibit the film pending pursuit and completion of state appellate remedies.

On or about November 19, 1969, appellant Garrett H. Byrne moved the court below to abstain from granting the relief sought in the Complaint pending resolution of the issues raised therein by the Massachusetts Supreme Judicial Court (App. 30). On November 28, 1969, after further argument, the court below, one judge dissenting, denied the motion for abstention, and ordered the issuance of a preliminary injunction enjoining future prosecutions in

[3] Appeals from those convictions are presently pending.

connection with the showing of the film (App. 31-43). On December 6, 1969, the court below issued the injunction (App. 44-45), but stayed its effect pending disposition of an application for a stay by this Court pursuant to Rules 18, 50, and 51, of the Rules of this Court (App. 46). On the same date, Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, was ordered added as a party defendant without objection (App. 44). On December 15, 1969, this Court stayed the effect of the preliminary injunction issued by the court below pending the filing and disposition of a Jurisdictional Statement (App. 46-52). A notice of appeal was filed on December 24, 1969 (App. 52-53). The jurisdictional Statement was filed on February 4, 1970. On March 23, 1970, this Court denied a motion to vacate the stay previously entered, and noted probable jurisdiction (App. 53).

Summary of Argument

I.

A. The majority of the court below held that First Amendment considerations invalidate statutes prohibiting commercial distribution of obscene and pornographic material *per se*—that enforcement against commercial distribution of obscene and pornographic material is proper only where there has been a showing of distribution to minors, pandering, or distribution in a manner offensive to those who are not willing to view such material. The majority further ruled that a state statute which prohibited commercial distribution of obscene and pornographic material without regard to the manner of distribution was unconstitutionally overbroad, and thus, facially invalid.

In so ruling, the majority below erred in its evaluation of relevant history and precedent of this Court. Relevant

history amply shows that the Founding Fathers never intended obscenity and pornography to be protected by the free speech or free press provisions of the First Amendment. Indeed, a majority of this Court, less than two decades ago, unequivocally declared that commercial distribution of obscenity and pornography was never intended to enjoy First Amendment protection. *Roth* v. *United States*, 354 U.S. 476. Nothing of consequence has emerged within the last two decades tending to show that the majority in *Roth* erred in its assessment of the relevant history pertaining to the adoption of the First Amendment, and this Court has consistently, since *Roth*, held that commercial distribution of obscenity and pornography does not enjoy First Amendment protection.

B. In any event, even if it can fairly be said that commercial distribution of obscenity and pornography falls within the penumbra of the First Amendment, the protection afforded that activity—like all other speech—is not absolute. In delimiting the scope and extent of protection accorded that activity, this Court should balance the legislative purpose served by legislation prohibiting it against whatever interests may be asserted by the commercial pornographer and those whom he purports to serve. The relevant history surrounding the adoption of the First Amendment, and precedent of this Court, shows that use of a "clear and present danger" test is particularly inappropriate to obscenity matters.

The legislative purpose served by legislation prohibiting commercial distribution of obscenity and pornography is dual in scope. Such legislation is directed towards protecting the public welfare, and the public morality.

With respect to the public welfare, the legislatures of the several states, have, after viewing the relevant and conflicting empirical evidence, reasonably concluded that there exists a substantial possibility visual access to ob-

scene and pornographic stimuli may induce crimes of violence and sex crimes. That conclusion is entirely reasonable at this point of time and learning—especially in view of the fact that the President's Commission on Obscenity and Pornography is presently making an endeavor to develop meaningful studies and empirical data with respect to this vital matter.

The legislatures of the several states have also concluded that commercial distribution of obscenity and pornography could result in a complete breakdown of the moral fabric of our society, which, in turn, would be extremely detrimental to the preservation of a just and ordered society. This conclusion finds ample support in history and experience, and it is beyond dispute that states retain the constitutional power to legislate with respect to matters touching purely moral judgments.

This clear legislative purpose, on balance, clearly outweighs any countervailing considerations which conceivably could be asserted by the commercial pornographer or by those whom he purports to serve. At best, he asserts only the privilege to distribute material which—as previously recognized by this Court—is utterly without redeeming social value. A proper balance clearly shows that the risk to the public welfare and public morality, by permitting commercial distribution of obscenity and pornography, is too great a one to be classified as subservient to the commerical pornographer's pecuniary desire to sell, at a profit, material which is utterly without redeeming social value.

C. A holding by this Court that prohibition of commercial distribution of obscenity and pornography is consistent with First Amendment considerations presents no conflict with the rationale of this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557. That case properly recognized that a man's library should be private, and governmental invasion of that privacy is warranted only upon a showing

of the most compelling countervailing reasons. This Court further recognized in that case that a statute which authorized punishment for private possession of obscene material necessarily encouraged—indeed, invited—lawless invasions of that constitutional right of privacy. In this regard, *Stanley* is fully consistent with the many decisions of this Court condemning the use of a "general" warrant, and "rummaging" under a special warrant. That case is also fully consistent with this Court's holding in *Griswold v. Connecticut*, 381 U.S. 479. In that case, the birth control statute there in issue, like the statute in issue in *Stanley*, necessarily invited, as a means of enforcement, governmental excursions into the privacies of the marital relationship—indeed, the marital bedroom—and was thus condemned. No issue arises with respect to a constitutional right of privacy in the enforcement of a statute prohibiting commercial distribution of obscene and pornographic material.

II.

A. The majority of the Court below, holding that the Massachusetts statute prohibiting commercial distribution of obscenity and pornography was "probably" unconstitutional on its face in the wake of *Stanley*, enjoined appellant Garrett H. Bryne, District Attorney for Suffolk County, from initiating any prosecutions with respect to the showing of the film, "I Am Curious (Yellow)." A majority of the court below ordered the issuance of an injunction despite the fact that no challenge was made to appellant's good faith in prosecuting, the fact that the Massachusetts Superior Court had found—and the court below assumed—the film obscene in the constitutional sense, and the fact that the Massachusetts Supreme Judi-

cial Court had not yet passed upon the validity of the statute in light of the *Stanley* decision.

In our view, the majority below erred in concluding that there was a showing of irreparable injury which, on balance, warranted the issuance of the extraordinary remedy of injunctive relief which had the effect of enjoining good-faith administration of state criminal laws. This Court has unequivocally held that such federal injunctive relief should issue only upon a most compelling showing of irreparable injury. *Douglas v. City of Jeanette*, 319 U.S. 157. This Court's holding in *Dombrowski v. Pfister*, 380 U.S. 479, is inapposite to this case. In *Dombrowski*, the statutes under challenge were *patently* unconstitutional on their face. The Massachusetts statute cannot fairly be characterized as *patently* unconstitutional on its face; indeed, even the majority below ruled only that it was *probably* unconstitutional on its face.

The record fails to support the finding that the threat of prosecution would cause an irreparable monetary loss. No evidence was offered on this matter, and it is not a matter of judicial notice. Appellees were not the owners of the film. Nor does the record establish a "chilling effect" on the rights of others. Thus, the court erred in concluding that the record showed irreparable injury

B. In any event, the court below should have abstained pending appeal by appellees from their state court convictions. The Massachusetts statute under challenge is fairly susceptible to a constitutional construction—even if *Stanley* extends to the point suggested by the majority—and the Massachusetts Supreme Judicial Court has, in the past, shown its willingness to construe state statutes consistent with emerging First Amendment doctrine.

Nothing in this Court's decisions in *Zwickler v. Koota*, 389 U.S. 241, and *Dombrowski v. Pfister*, 380 U.S. 479, indicates that abstention would have been improper. In

Zwickler, the statute under challenge was not susceptible to further construction. And in *Dombrowski*, the statutes under challenge were *patently* unconstitutional on their face, and could not have been construed in a single state proceeding. Moreover, in *Dombrowski*, it was alleged that prosecutions were threatened in bad faith simply for the purpose of discouraging protected activities. In the present case, no challenge was made—and, indeed, no challenge could be made—to the good faith of the prosecutor. Moreover, in the present case, the statute under challenge clearly is not *patently* unconstitutional on its face. Finally, the issues which appellees raised in the court below could be fully resolved on their appeal from the state court convictions. Indeed, those issues could have been fully resolved in a single *civil* proceeding in the state courts, had appellees so desired.

Argument

I. A State May Properly Prohibit Commercial Distribution of Obscene Material.

A. *Introduction.*

In *Roth* v. *United States*, 354 U.S. 476, and cases following it [with the possible exception of *Stanley* v. *Georgia*, 394 U.S. 557], a majority of this Court has consistently held and shared the view that a state may, wholly consistent with the First Amendment, prohibit the commercial distribution of obscene material. The rationale underlying those decisions was not that the interest of the state in barring traffic in obscenity was paramount to that of the trafficker, but simply the proposition that obscenity *qua* obscenity was never intended to enjoy First Amendment protection. In *Stanley* v. *Georgia*, 394 U.S. 557 [a case which we discuss in greater detail *infra*, pp. 26-29], a majority of this Court ruled—or at least intimated—that

First Amendment protection would extend to the possession of obscene material within the privacy of one's home. In so ruling, however, the Court did not purport to overrule the underpinnings of the *Roth* rationale—at least to the extent that *Roth* was applicable to commercial distribution of obscene material.

A majority of the court below, in an attempted reconciliation of *Stanley* and *Roth*, ruled (1) that obscenity *qua* obscenity falls within the penumbra of the First Amendment (2) that commercial distribution of obscene material may be *regulated*, but never completely *prohibited*; and (3) that the only proper legislation touching the area of commercial distribution and exhibition of obscene *films* is legislation protecting minors, preventing the exposure of such material to an otherwise non-consenting monitor, or which excluded pandering as a means of advertisement.[4]

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[4] We note at the outset that a majority of the court below has concluded—and appellees apparently have conceded—that the state can, consistent with First Amendment considerations, prohibit pandering of obscene materials. This holding and concession, however, appears to be diametrically inconsistent with the broader principle that the court below adopted —i.e., that even obscene material is protected by the First Amendment. In *Ginzburg* v. *United States*, 383 U.S. 463, a case which the court below and appellees apparently embrace as fully consistent with their broader views, a majority of this Court ruled that the manner of distribution—i.e., pandering—is relevant to a determination of the obscenity *vel non* of the challenged material. See also, *Mishkin* v. *New York*, 388 U.S. 502, 511. As we read the opinion in that case, this Court did not purport to rule that pandering *qua* pandering was a crime. But see, *People* v. *Noruff*, 63 Cal. Rept. 575, 433 P.2d 479 (1967). The petitioner in that case was charged with mailing obscene matter in violation of 18 U.S.C. 1461. Although, we suppose, "pandering" could be classified as a crime in the nature of fraud, if the touted materials did not live up to their description, the simple fact of the matter is that the petitioner in *Ginzburg* was not charged with fraud. He was charged with mailing obscene material in violation of 18 U.S.C. 1461, and the holding in the *Ginzburg* case—simply an evidentiary holding in the posture presented—is fully consistent with our view that commercial distribution of obscene material does not enjoy First Amendment protection.

In our view, the majority of the court below erred in its hypothesis and conclusion. As we point out below, obscenity *qua* obscenity was never intended to enjoy First Amendment protection. Alternatively, we argue, even if commercial distribution of obscenity falls within the shroud of the First Amendment, paramount interests of the state in providing for the public welfare and morality of its citizens far outweigh the social value supposedly inherent in obscene material, and thus, that the state can, consistent with that Amendment, prohibit the exhibition of obscene films for those consenting adults who are otherwise willing to pay the admission price. Finally, we point out that a holding that the state may properly prohibit commercial distribution of obscene material presents no conflict with this Court's holding in *Stanley v. Georgia*, 394 U.S. 557.

B. *Obscenity is Not Protected Speech Under the First Amendment to the United States Constitution.*

In determining whether or not obscenity enjoys First Amendment protection, the starting point must be that Amendment itself, and the controlling intent and purpose behind its adoption and ratification. We are unaware of any mention of the question of obscenity *vis a vis* that Amendment during the extensive debates leading to its adoption and ratification. We must therefore turn to other known evidence which might have a bearing on controlling intent.

As has been much more extensively pointed out to this Court on another occasion,[5] the relevant evidence shows that the community which authorized and adopted the free speech provision of the First Amendment did not consider

[5] Brief for the United States, *Roth v. United States*, No. 582, O.T. 1956, pp. 21-28.

obscenity and profanity to be on the same plane as communication of social or political ideas. As early as 1711, well before adoption and ratification of the First Amendment, the Commonwealth of Massachusetts had a statute in force punishing obscene publications.[6] Similar statutes were enacted by Connecticut in 1834,[7] and New Hampshire in 1842.[8] In 1811, within a decade of the adoption of that Amendment, and while the nation still remembered its grave implications, one court—in recognizing the relationship between profanity and obscenity—was quick to remark (*The People* v. *Ruggles*, 8 Johns [N.Y.] 290, 294-295 (1811):

> Things which corrupt moral sentiment, as obscene actions, prints, and writing, and even gross instances of seduction have, upon the same principle, been held indictable; * * *.

In 1815, the commercial showing of an obscene painting was ruled indictable, *The Commonwealth* v. *Sharpless, et al.*, 2 S. and R. (Pa.) 91, as was the publication of an obscene book in 1821, *Commonwealth* v. *Holmes*, 17 Mass. 335 (1821),[9] at a time when the constitutions of both the Commonwealth of Pennsylvania and Commonwealth of Massachusetts specifically guaranteed the right to a free press.[10]

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[6] Volume I, Acts and Resolves of Massachusetts Bay (1692-1714), Section 19, p. 682.

[7] Connecticut Revised Statutes (1849), §§ 135-136.

[8] Revised Statutes of New Hampshire (1842), c. 113, § 2, p. 221.

[9] The book involved in the *Holmes* case was "Memoirs of a Woman of Pleasure"—the same book subsequently found not obscene by this Court in *Memoirs* v. *Massachusetts*, 383 U.S. 413. This turn of events, however, does not indicate that obscenity is protected speech, but only that contemporary community standards may change with the passing of time.

[10] Article 12, Constitution of Pennsylvania (1776); Article XVI, Constitution of Massachusetts (1780).

This indicia which history has recorded—we suggest—clearly indicates that the community which envisioned and made the First Amendment a reality never intended obscenity to be protected speech. More importantly, however, this evidence of intent and purpose was sufficient to prompt five Justices of this Court to unequivocally conclude (*Roth* v. *United States* 354 U.S. 476, 483-485):

> At the time of the adoption of the First Amendment, obscenity law was not fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press (Footnote omitted).
>
> * * * *
>
> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. (Footnote omitted).
>
> * * * *
>
> We hold that obscenity is not within the area of constitutionally protected free speech or press.

Nothing of consequence has changed in the past decade or so since the decision in *Roth*. To be sure, relevant tastes and contemporary community standards have shifted, as is clearly reflected in the numerous *per curiam* opinions of this Court indicating that which is, and which is not, obscene. This shift in community standards, however, has no bearing whatsoever on the historical point of fact that

obscenity *qua* obscenity does not fall within the First Amendment guarantee.

In these circumstances—since commercial distribution of obscenity enjoys no First Amendment protection—a state may properly regulate and prohibit that activity. *Roth* v. *United States*, 354 U.S. 476.

C. Even if Obscenity is Speech Which Falls Within the broad reach of the First Amendment, that Amendment is Not Absolute, and the State May Properly Prohibit Commercial Distribution of Obscenity Consistent With That Amendment.

If we are wrong in our position that obscenity *qua* obscenity does not enjoy First Amendment protection—a position clearly set forth by the relevant opinions of this Court in the past—then it is nevertheless clear that obscenity, like all other forms of speech, may properly, under given circumstances, be regulated—and indeed, prohibited—by the state. The given set of circumstances necessary to give rise to the right to prohibit depends, in the first instance, upon the test to be applied. Since this Court has always assumed that obscenity does not fall within the First Amendment, it has consistently avoided determination of the applicable test. *E.g., Ginsberg* v. *New York*, 390 U.S. 629, 641, n. 9. As we point out below, it seems that a "balancing test", and not a "clear and present danger" test, is particularly appropriate with respect to obscenity matters. Moreover, we point out that, in applying the balancing test, the interest of the state in safeguarding the public welfare and morality of its citizens far outweighs any countervailing interests which conceivably could be asserted by the commercial pornographer.

1. *The applicable test.*

As mentioned above, this Court has never determined what test should be applied with respect to obscenity matters, since it has always assumed that obscenity falls outside the protection of the First Amendment. With respect to other First Amendment considerations, however, two tests of general application have emerged from the varying opinions of this Court[11]—the "clear and present danger" test,[12] and the so-called "balancing" test.[13] Nothing in the varying opinions of this Court indicates when one

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[11] A possible third test, the so-called "absolute" test (see, Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 914-916 (1963)), has never been accepted by a majority of this Court. Some have suggested that a desire for "judicial convenience" justifies an absolutist approach. Judicial convenience has never been held by this Court to be a reason to avoid First Amendment considerations. This Court has, in the past, assumed the role of final arbiter dealing with First Amendment rights, and particularly the issue of the obscenity *vel non* of challenged material. See *Jacobellis v. Ohio*, 378 U.S. 184. We recognize that this burden necessarily casts each individual Justice into the unfamiliar and time-consuming role of super-psychiatrist [to assess the "prurient interest" aspect of the *Roth* test], super-demographer [to assess governing community standards], and super-literary expert [to assess the "social value" of the particular piece of work]. Judicial convenience is not a valid reason for casting aside state obscenity laws. Nor is it reasonable to afford obscenity absolute First Amendment protection solely for the sake of judicial convenience. See *People* v. *Bercowitz*, N.Y. Crim. Ct., New York City (38 U.S.L.W. 2510 March 6, 1970). Perhaps this Court could set new procedural guidelines to make the obscenity problem more compatible with our existing judicial structure. But sweeping the matter under the rug simply to avoid judicial disharmony and decision does not answer the problem—it simply postpones the matter to a later day.

[12] *Schenck* v. *United States*, 249 U.S. 47, 62; see also *Frohwerk* v. *United States*, 249 U.S. 204; *Debs* v. *United States*, 249 U.S. 211; *Abrams* v. *United States*, 250 U.S. 616; *Schaefer* v. *United States*, 251 U.S. 466; *Pierce* v. *United States*, 252 U.S. 239.

[13] *American Communications Association* v. *Douds*, 339 U.S. 382. See also the concurring opinions of Mr. Justice Frankfurter in *Dennis* v. *United States*, 341 U.S. 494, 517, and *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1. And for the suggestion that, beginning with *American Communications Association* v. *Douds*, *supra*, the "balancing of interests" formula has substantially supplanted the "clear and present danger" test, see Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (1966), pp. 76-105.

test is preferred to the other. Therefore, starting afresh, it appears to us that the latter test is more appropriate in dealing with problems of obscenity, simply because the "clear and present danger" test assumes too much from too little. That test has almost methodically been applied to cases concerning political writings and utterances.[14] In that context, the test is a desirable one, since it assumes that political utterances—i.e., utterances urging the reform, abandonment, or change, of our existing political structures and institutions—are always valuable to a free and enlightened society. That assumption of course, is wholly consistent with the governing motivations underlying adoption of the First Amendment. That assumption does not, however, hold true when the test is removed from that context to the area of obscenity. A plurality opinion of this Court has already found that obscenity has no value, since it is "utterly without redeeming social value." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418. Thus, the assumption that obscenity carries some social value—in our view, a *sine qua non* to the application of the "clear and present danger" test— is simply untenable. We therefore suggest that this Court should—assuming that it first finds that obscenity falls within the penumbra of rights guaranteed by the First Amendment—apply a balancing test in delimiting the scope and extent of governmental action in this area.

2. *The Public Interests Served by Restrictions on Commercial Distribution of Obscene and Pornographic Materials.*

Underlying legislative restrictions placed on the commercial distribution of obscenity and pornography is the assumption that it is inimical to the public welfare, and the further assumption that such material is detrimental

[14] See footnote 12, *supra*.

to public morality. We discuss these separate and distinct considerations below.

(a) *The Legislature Has Made a Reasonable Judgment that pornography and obscenity are inimical to the Public Welfare.*

One of the underlying assumptions to all obscenity legislation is that visual access to obscene and pornographic stimuli may induce crimes of violence or sexual crimes. In our view, that assumption is sufficiently substantiated so as to permit legislative action directed towards the end of prohibiting commercial distribution of obscenity and pornography.[15] We are aware, of course, of the studies of Cairns, Paul & Wishner,[16] and of Jahoda,[17] indicating the lack of reliable empirical evidence substantiating a basis for that assumption. We are also aware, however, of those reported studies and opinions—fully and fairly collected by Mr. Justice Clark [*Memoirs* v. *Massachusetts*,

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[15] We do not read this Court's opinion in *Stanley* v. *Georgia*, 394 U.S. 557, as having finally rejected that assumption. To be sure, this Court—referring to the studies of Cairns, Paul & Wishner [Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 (1962)], and Jahoda [Jahoda, *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954)] — indicated that "[t]here appears to be little empirical basis for that assertion." But—as we read that opinion—that assumption that exposure to obscenity and pornography leads to crimes of sexual violence was rejected by this Court, not as *untrustworthy*, but as *irrelevant*, since this Court was of the opinion that, at least with respect to *private possession* of obscene material, less restrictive penal provisions, dealing directly with the sexual crimes themselves, could be drawn and enforced by the state. Different considerations, we suggest, should control with respect to commercial distribution.

[16] See footnote 15, above.

[17] See footnote 15, above. Dr. Johoda's research is fully summarized in Judge Frank's concurring opinion in *United States* v. *Roth*, 237 F.2d 796, 814-816 (C.A. 2).

383 U.S. 413, 451-453 (dissenting opinion)]—indicating that there may well be such a relationship between obscenity and crimes of violence or sexual crimes.

We do not point out these contrasting views in order to take sides. That is not the point. The critical question is, not who is right, but which body of government should first make that decision. In our view, at least in the first instance, the decision should not be made by this Court. Under our system of constitutional government, it has always been the function of the legislative body to collect the relevant facts, to sift the believable from the unbelievable, and to enact legislation on that basis. That traditionally has not been the function of the judicial branch of government.[18] To be sure, legislative determination of factual issues is not wholly impervious to judicial inquiry, and this Court has—on many occasions—pierced the legislative judgment on the ground that the judgment is totally devoid of any factual support. Such action by this Court is consistent with its traditional function of judicial review. But recognition of that basic principle does not suggest that its application is proper in the present case.

At the present time, the only safe statement which can be made is that the empirical evidence presently available is simply inconclusive. One sampling of behavioral studies indicates that a causal relationship does not exist, while another sampling of similar studies makes assertions to the contrary. Psychiatric studies in this area are nonexistent. In recognition of this grave uncertainty, Congress, in 1967, established the Commission on Obscenity

[18] This Court does not sit as a "superlegislature to weigh the wisdom of legislation." *Day-Brite Lighting Co., Inc.* v. *Missouri*, 342 U.S. 421, 423; *Ferguson* v. *Skrupa*, 372 U.S. 726, 728-733; *Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 533-534 (dissenting opinion of Mr. Justice Brandeis, with whom Mr. Justice Holmes concurred). And see, particularly with respect to First Amendment considerations, *Tinker* v. *School District*, 37 U.S.L.W. 4121, 4125-4128 (dissenting opinion of Mr. Justice Black).

and Pornography. Public Law 90-100, 83 Stat. 253 (1967). One of the specific tasks assigned that Commission by Congress was—

> (3) to study the effect of obscenity and pornography on the public, and particularly minors, and its relationship to crime and other antisocial behavior;

Commission on Obscenity and Pornography, *Progress Report*, (July 1969), p. 1. The Commission itself, after preliminary analysis, has recognized the complete lack of controlling empirical evidence with respect to these vital questions. Id. at pp. 5-7.[19]

In these circumstances, it is premature for this Court to reject—without a full and fair hearing—one time-honored assumption that exposure to obscenity may induce substantive evils which the legislature concededly has the power to proscribe. The legislatures of 50 states—after viewing the evidence—have reasonably concluded that, at this juncture of time and learning, an ounce of prevention is preferred to a pound of cure. Future empirical developments may prove that assumption—or it may not. Legislators, however,—upon whom, after all, falls the burden of making decisions on a day to day basis—must act today, not tomorrow. They cannot share the luxury of the theoretician who can wait until all of the empirical evidence is developed and synthesized. They have today acted on the only evidence which is available, and have conscientiously determined that the risk is too great to be ignored. This Court should not—on the basis of the present evidence—cast that legislative judgment of every state aside.[20]

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[19] We understand that a final report of the Commission is due in July, 1970.

[20] Ala. Code, Tit. 14, §374(3); Alaska Statutes Title 11 Sec. 11.40.160; Arizona A.R.S., §13-531.01; Arkansas Stat. Ann., §41-

(b) *A state legislature, may, consistent with constitutional limitations, foster morality, and take affirmative steps discouraging and preventing immorality.*

If we are wrong in our position that the legislature, consistent with First Amendment considerations, could validly conclude that there is a causal relationship between the commercial distribution of obscenity and tangible evils with which the legislature concededly has the power to deal — e.g., crimes of violence or sex crimes — legislation prohibiting the commercial distribution of obscene material is nevertheless a valid incident of the police power left to the states. It has become fashionable as of late, in discussing the whole question of obscenity, to — after characterizing the empirical evidence as untrustworthy or nonexistent — conclude that the subject is really one of morality, and to simply dismiss it as that. Apparently sub-

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2729 (Repl. 1964); California Pen. C.A., §311, §311.2; Colorado CRS 1963, §40-9-17; Connecticut C.G.S.A., §53-243; Delaware 11 Del. C., §711; Florida F.S.A., §847.011; Georgia Code Ann., §26-6301; Hawaii Rev. St., Sec. 727-8; Idaho I.C., §18-4101; Illinois S.H.A. Ch. 38, §11-20; Indiana A.I.S., §10-2803; Iowa I.C.A., §725.3; Kansas Gen. St. 21-1102 et sep; Kentucky KRS, §436.101; Louisiana LSA-R.S. 4:301; Maine. 17 M.R.S.A., §2901; Maryland Art. 27, §417; Massachusetts M.G.L. 272, §28A; Michigan M.C.L.A., §750.343A, §750343B; Minnesota M.S.A., §617.243; Mississippi Sec. 2286, Code 1942; Missouri RSMO 563.280; Montana Sec. 94-3603, Revsd. Vol. 8, Revised Codes of Montana; Nebraska R.R.S. 1943, §28-1120; Nevada Rev. St. 201.250; New Hampshire RSA 571-A:1 (Supp); New Jersey N.J.S.A. 2A:115-1.1; New Mexico gives local government the option to enact such legislation. See New Mexico Rev. St. 14-17-12; New York Penal Law, §235.00; North Carolina G.S. 14-189.1; North Dakota N.D.C.C. 12-21-07; Ohio Section 2905.34 Revised Code; Oklahoma St. Ann. Title 21, §1040.13; Oregon Rev. St., §167.151; Pennsylvania Purdon's Pa. Stat. Ann. Title 18, §4524; Rhode Island Gen. Laws R.I., §11-31-1; South Carolina S.C. §16-414.1, §116-414-2; South Dakota S.D. compiled Laws 22-24-11, §2; Tennessee Code Ann., §39-3003; Texas Vernan's Texas Penal Code Art. 527; Utah Code Ann., §76-39-5; Vermont 13 V.S.A., §2801; Virginia Code 18.1.228 - 18.236.4; Washington RCWA, §9.68, 010; West Virginia Code, §61-8-11; Wisconsin Stat. Ann. 944.21; Wyoming Statutes 6-103, 6-104.

sumed in this approach is the socio-political theory that the state has no right to legislate with respect to purely moral judgments. The question before this Court, however, is not whether, as a socio-political or philosophical matter, the state should legislate in this area, but whether such legislation is consistent with the United States Constitution. In our view, just as the Constitution does not "... enact Mr. Herbert Spencer's Social Statics," *Lochner* v. *New York*, 198 U.S. 45, 75 (dissenting opinion of Mr. Justice Holmes), so it does not embrace Hugh Heffner's "Playboy Philosophy" that moral judgments with respect to matters of sex are beyond the reach of legislative determination and demarcation.

On the contrary, this Court has consistently ruled that moral judgments, consistent with applicable constitutional limitations, can and should be made by the state.[21] Thus, this Court, in interpreting the Constitution, has held that the state has the constitutional power to prohibit bigamy — indeed, even the advocacy of bigamy — because that relationship is inimical to our way of life and public morality. *Reynolds* v. *United States*, 98 U.S. 145; *Davis* v. *Beacon*, 133 U.S. 333, 342. This, in effect, involves a purely moral judgment on the part of the legislative branch. Other cases sustaining the use of the police power to foster morality and discourage or prohibit immorality are legion. Thus, it has been held that the state has the constitutional right to discourage or prohibit gambling in one form or another, *Stone* v. *Mississippi*, 101 U.S. 814; *New Orleans*

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[21] In this context, we use the word "state" as the equivalent of "government", be it federal, state, or local. We recognize, however, the distinctions drawn between federal and state power by individual Justices of this Court—especially with respect to the issue of obscenity. E.g., *Roth* v. *United States*, 354 U.S. 476, 496-498 (Mr. Justice Harlan, concurring in part and dissenting in part); *Memoirs* v. *Massachusetts*, 383 U.S. 413, 455 (Mr. Justice Harlan dissenting); *Carlos* v. *New York*, No. 524 O.T. 1969, 38 U.S.L.W. 3209 (opinion of The Chief Justice and Mr. Justice Harlan).

v. *Houston*, 119 U.S. 265; *Douglas* v. *Kentucky*, 168 U.S. 488; *Marvin* v. *Trout*, 199 U.S. 212; *Trading Stamp Cases*; *Rast* v. *Van Deman & Lewis*, 240 U.S. 342; *Tanner* v. *Little*, 240 U.S. 369; *Pitney* v. *Washington*, 240 U.S. 387; *Marchetti* v. *United States*, 390 U.S. 39, 44, 61.[22] The state has the power to prohibit or discourage the manufacture and distribution of intoxicating beverages, *License Cases*, 5 How. 504; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U.S. 25; *Mugler* v. *Kansas*, 123 U.S. 623; *Crowley* v. *Christensen*, 137 U.S. 86; *Crane* v. *Campbell*, 245 U.S. 304; *Samuels* v. *McCurdy*, 267 U.S. 188; see also *Van Oster* v. *Kansas*, 272 U.S. 465; *Eiger* v. *Garrity*, 246 U.S. 97; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192; the constitutional power to prohibit "futures" trading, *Booth* v. *Illinois*, 184 U.S. 425; to prohibit, except in certain specified cases, the maintenance of any billiard hall or pool room, *Murphy* v. *California*, 225 U.S. 623, 628-630; and to prohibit the transportation of females in interstate commerce for the purpose of prostitution or debauchery; *Hoke* v. *United States*, 227 U.S. 308; *Caminetti* v. *United States*, 242 U.S. 470. The above cases represent but a sampling of the many cases in which this Court has defined and recognized the right of the state to regulate in areas touching upon morality. Other morality judgments—particularly at the state and local level—are reflected in the various and numerous penal codes prohibiting fornication, sodomy as between consenting adults, and adultery. All told, it seems beyond dispute that the state may constitutionally legislate in areas touching public morality.

We re-emphasize that the question before this Court is

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[22] Some have attempted to explain that prohibition of gambling is a proper legislative purpose only because, as an economic fact of life, it affects those who are least able to absorb gambling losses, and thus affects society at large. This justification, however, is conveniently forgotten or ignored with respect to legislation dealing with pari-mutuel betting, state-run lotteries, and other forms of legal gambling.

not whether it is right or wrong to legislate with respect to purely moral questions.[23] The question is simply whether such legislation is consistent with the United States Constitution. In our view, any argument to the contrary has been repeatedly and decisively foreclosed by the decisions of this Court.

3. The valid legislative purpose of protecting the public welfare and public morality clearly outweighs any countervailing interest which could conceivably be asserted by those who commercially distribute obscene and pornographic material.

We have pointed out above that—as a question of constitutional power—state legislatures have the broad right, indeed, the solemn duty, to take reasonable steps towards protecting the public welfare and public morality. In accordance with this duty, the legislative bodies of the several states have rationally concluded that commercial distribution of obscenity and pornography could very well lead to crimes of violence or sexual crimes, and to a serious breakdown of the moral fabric so necessary to a just and ordered society. On the other hand—a plurality of this Court has already determined that obscenity and pornography may properly be defined as material which is "utterly without redeeming social value." *Memoirs v. Massachusetts*, 383 U.S. 413, 418.

[23] We deal here primarily with "legislative" action touching on purely moral issues. The legislative branch of government, however, is not the only branch which deals with purely moral decisions on a day to day basis. Every time a prosecutor decides not to prosecute an otherwise prosecutable crime because of some extenuating circumstances, he has made a moral judgment. Every time this and other Courts have made a determination of what constitutes "due process of law" or a "fair trial", moral considerations play a large role. And, indeed, in the present case, appellees bring their cause under the Fourteenth Amendment—itself a product of moral judgment made by the people through the amendment process.

In these circumstances, the result of any balancing of the competing interests is at once self-evident. Stripped to its bare essentials, the only interest which the commercial pornographer can realistically assert is his self-serving interest of making a profit from exploitation of filth for filth's sake—nothing more, nothing less. That interest, however, can hardly rise to a level paramount to the welfare and morality of the public at large. The First Amendment does not permit the commercial pornographer to reap his ill-gained profits at the expense of all. If future empirical developments show that commercial distribution of pornography is not detrimental to the public welfare, or that a breakdown in moral fabric presents no serious blow to the preservation of a just and ordered society, then let the commercial pornographer raise his voice to this Court at that time. Until that time, his plea should be made solely to the legislative forum which is entrusted with the solemn duty of safeguarding the public welfare and public morality of all citizens,[24] and which is the representative branch of government.[25]

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[24] Many have said that it is impossible to legislate morality—that a person who is determined to be immoral will be so despite legislation to the contrary. The validity of that observation is not entirely clear. Moreover, that observation is *irrelevant*. Removal of legislation prohibiting commercial dissemination of pornography—whether by legislative repeal or judicial decree—does more than simply remove the ban. It, in a sense, legitimizes the activity, and gives it a cloak of governmental approval and sanction. In fact, removal of the ban would, in our view, directly encourage it. Thus, although presence of the statute may not in fact bring a halt to all immorality, removal of that statute would foster immorality—in our view, the worse of the two evils.

[25] Mr. Justice Holmes cautioned us long ago: "The life of the law has not been logic: it has been experience." Holmes, *The Common Law*, (Mark DeWolfe Howe, Ed. 1963), p. 5. That entreaty is as valid today as it was when said.

We may be accused of begging the question by asserting the use of a "balancing" test, referring to this Court's definition of obscenity — i.e., material utterly without redeeming social value — and then concluding that the legislative purpose of safeguarding the public welfare and public morality, on balance, outweighs the interests asserted

D. *The Holding In* Roth v. United States, 354 U.S. 476, *That A State May, Consistent With First Amendment Considerations, Prohibit Commercial Distribution Of Obscene And Pornographic Material, Presents No Conflict With This Court's Subsequent Holding In* Stanley v. Georgia, 394 U.S. 557.

In our view, a holding by this Court that a state—in the interest of safeguarding public welfare and public morality—may prohibit commercial distribution and dissemination of obscenity and pornography presents no conflict with this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557. In that

by the commercial pornographer and those whom he purports to serve. But within the context of the decision-making process—whether it be within the legislative, judicial, or executive, branch of government—the decision maker should, as suggested by Mr. Justice Holmes, first look to *reason*, not *logic*. The logician's syllogism, although it provides for the quick and easy solution, does not necessarily provide for the just one. The logician would say that the self-incrimination clause of the Fifth Amendment does not extend beyond the courtroom. That is, after all, what that Amendment says—nothing more, nothing less. But common sense and common experience has taught us otherwise. Reason—which embodies the intangibles of common sense and common experience—has looked beyond the logician's inflexible rules and has demanded that the privilege against self-incrimination extend beyond the confines of the courtroom to the jailhouse (*Miranda* v. *Arizona*, 384 U.S. 436), and, indeed, to the home (*Orozco* v. *Texas*, 394 U.S. 324). So, we suggest, *reason*, not *logic*, compellingly points to the conclusion that the legislative purpose of protecting the public welfare and public morality transcends the interests of the commercial pornographer.

In any event, the argument which we advance is not a product of the parity of our pen, but of the quill of our Founding Fathers, and controlling precedent of this Court. History has recorded the noble purpose behind the First Amendment. As we read that relevant history—and as that relevant history has been interpreted by this Court—our Founding Fathers were rightfully concerned that ideas having social value, no matter how distasteful to the prevailing public opinion, should not be suppressed from the market place of ideas. Hence, the First Amendment. Application of the "clear and present danger" test to ideas utterly without redeeming social value does not advance the preferred freedoms safeguarded by the First Amendment—it simply denigrates the noble purpose behind that Amendment's adoption. Thus, the argument is not ours: it is that of history.

case, the Georgia statute under challenge (Ga. Code Ann. §26-6301 [Supp. 1968]) prohibited, under pain of penalty, private possession of material known to be obscene. This Court, in part pointing to complementary roles between the First and Fourth Amendments, reversed the conviction based upon that statute, holding that a state cannot constitutionally punish a person for private possession of obscene material within the privacy of his home.

That decision, however, presents no conflict with *Roth*. The thought that one should not be prosecuted for the contents of his library, and the material which he reads within the privacy of his home, is older than the Constitution itself. It first found expression in *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765). Although that case involved a prosecution for seditious libel—the primary target of the First Amendment—its implications are broader. It recognized that a special right of privacy should attach to the contents of a man's library—the material which he persuses in the privacy of his home. Only the most compelling reasons—and, as recognized by this Court in *Stanley*, the desire of the state to prosecute for private possession of obscene material is not such a compelling reason—justifies governmental invasion of that sacrosanct right of privacy of the home.

As a question of Fourth Amendment law, the rationale underlying this special right of privacy has been universally accepted by this Court. It has usually found its expression in those cases condemning rummaging-type searches by police officers. E.g., *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344; *United States* v. *Lefkowitz*, 285 U.S. 452; *Kremen* v. *United States*, 353 U.S. 346; *Chimel* v. *California*, 395 U.S. 752. Unlike other evidence, writings, films, and other effects which are the sum and substance of a man's library, cannot be effectively seized without some degree of rummaging. Because of their very

nature, books and films, and the contents thereof, cannot be specified with any degree of certainty before the search. Only after an examination of many papers and films—many of which a police officer or other governmental agent has no business to read—can the officer seize that which he originally intended. By the time he has found that which he had intended to seize, the officer may have learned of the political leanings of the person whose library he has searched, or of his romantic escapes of a time since past. No one would suggest that the state has a legitimate interest in prying into these secrets, and, in reality, the warrant is akin to the general warrant condemned by the Fourth Amendment.

It is this constitutional philosophy, we would suggest, which prompted this Court to rule as it did in *Stanley*. A statute which provides for punishment for possession of obscene material within the privacy of one's home necessarily invites and encourages rummaging through private libraries as a means of enforcement. This is the very evil, we would suggest, which prompted this Court to rule as it did in *Griswold* v. *Connecticut*, 381 U.S. 479. As the birth control statute there in issue invited governmental excursions into the privacies of the marital relationship—indeed, the marital bedroom—so a statute which forbids private possession of obscene material invites rummaging through one's library. Neither governmental invasion is consistent with our constitutional scheme, and neither should be invited or encouraged by legislation which necessarily, as a means of enforcement, invites that result.

It is clear, moreover, that this principle—and the concomitant rights which that principle vouchsafes—has no just application to legislation prohibiting commercial distribution of obscene and pornographic material. Such legislation does not flirt with the privacies of one's home or library—indeed, it is directed towards an enterprise which

is clearly public in nature. Enforcement of that legislation does not invite lawless invasions of the right to privacy secured by the Fourth Amendment. In these circumstances, nothing in *Stanley* v. *Georgia*, 394 U.S. 557, or the underlying rationale of that decision, prohibits the states from proscribing commercial distribution of obscene material which the several legislatures—in their wisdom—have concluded would be detrimental to the public welfare and public morality of the citizens which they serve.

II. The Majority of the Court Below Abused Its Discretion in Granting Injunctive Relief in the Circumstances of This Case.

A. *Introduction.*

As set forth in the Statement above, appellees, by way of their Complaint, sought to enjoin all future prosecutions in connection with the showing of the film, "I Am Curious (Yellow)," under the provisions of the Civil Rights Act (42 U.S.C. 1983), on the ground that the statute (Mass. Gen. Laws, ch. 272, §28A) was unconstitutional on its face in light of this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557.[26] By an amendment to their Complaint, appellees further sought a declaratory judgment under the provisions of 28 U.S.C. 2201, as to the constitutionality of that statute for the same reasons. In the court below, appellants argued that appellees did not make out a cause of action in equity

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[26] No question is presented here concerning application of the anti-injunction statute (28 U.S.C. 2283). In light of this Court's holding in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, all parties assumed that the statute was not applicable, since appellees, by filing their Complaint in the court below before return of the state court indictments, had won "the race to the forum of [their] choice * * *." *Dombrowski*, at 502 (dissenting opinion of Mr. Justice Harlan).

warranting the extreme measure of injunctive relief which they requested. Appellants further argued that—even if such injunctive relief was otherwise warranted under traditional notions of equity—the court should abstain pending resolution of the issues, and possible construction of that statute, by the Massachusetts Supreme Judicial Court.[27] A majority of the court below rejected both arguments. The majority found that irreparable injury would befall appellees in the absence of immediate injunctive relief, and that the doctrine of abstention was not applicable. Judge Julian, dissenting from that opinion, found the record devoid of any evidence supporting a finding of irreparable injury. He further pointed out that abstention would have been most appropriate in the circumstances.

In our view, the majority below erred in concluding that special circumstances existed which warranted the issuance of the drastic remedy of an injunction enjoining good-faith prosecutions brought by a state law enforcement officer charged to enforce state law. We point out below that the record is conspicuously bare of evidence showing irreparable injury—in our view, a *sine qua non* to the granting of injunctive relief by a federal court in the circumstances of this case. We further point out that abstention was most appropriate in the circumstances of this case.

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[27] In their Motion to Affirm (p. 16, n. 9), appellees suggest that the Massachusetts Supreme Judicial Court has already *impliedly* rejected the *Stanley* rationale, since the *Stanley* argument was brought to the attention of that Court during oral argument. That suggestion, however, is contrary to established fact. In the court below, counsel for appellees specifically represented that the *Stanley* argument was *not* brought to the attention of the Massachusetts Supreme Judicial Court. (See November 21, 1969 Hearing Transcript, at pages 12-13, on file with the Clerk of this Court as an exhibit).

B. *The Record Fails To Support The Finding Of Irreparable Injury Which, On Balance, Warranted The Issuance Of The Drastic Remedy Of Injunction Which Enjoined Good-Faith Enforcement Of State Criminal Laws.*

In *Douglas* v. *City of Jeanette*, 319 U.S. 157, this Court cautioned that, consistent with well-established and deeply-rooted concepts of comity and federalism, a federal court should be extremely reluctant in granting injunctive relief which would have the effect of enjoining good-faith enforcement of state criminal laws by state law enforcement authorities charged with the duty of enforcement; that such relief should be granted only upon the most compelling showing of irreparable injury which, on balance, was paramount to the entire constitutional concept of federalism. That rule of law—judge-made in the first instance, but which has found expression in Congressional legislation[28]—is as applicable today as it was in 1943. *Dombrowski* v. *Pfister*, 380 U.S. 479, 483-485; *Zwickler* v. *Koota*, 389 U.S. 241, 253; *Cameron* v. *Johnson*, 390 U.S. 611, 618. The Court in *Douglas* further held that the injury "incidental to every criminal proceeding brought lawfully in good faith" was not—standing alone—sufficient to make out a showing of irreparable injury. *Douglas*, at 164.[29]

In *Dombrowski* v. *Pfister*, 380 U.S. 479, this Court indeed found "special circumstances"—i.e., irreparable injury—which warranted departure from the *Douglas* rule. In that case, the appellants alleged that they were threatened with

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[28] E.g., 28 U.S.C. 2281, 2283.

[29] See also, *Cameron*, *supra* at 618:

> Federal interference with a State's good-faith administration of its criminal laws "is peculiarly inconsistent with our federal framework" and a showing of "special circumstances" beyond the injury incidental to every proceeding brought lawfully and in good faith is requisite to a finding of irreparable injury sufficient to justify the extraordinary remedy of an injunction.

prosecution "under statutes allegedly overbroad and seriously inhibiting the exercise of protected freedoms" (380 U.S. at 489), and which could not — without risk of criminal prosecution — be challenged because of rigid standing requirements; that the appellees repeatedly announced that the appellant organization — in fact a civil rights organization — was a Communist-front organization (380 U.S. at 488); that appellees — during the course of a search which was subsequently found to be unlawful — "ransacked" the files and records of the organization (380 U.S. at 487-488); that potential members of, and contributors to, the organization were frightened off by the conduct of the appellees (380 U.S. at 488); and that there was no possibility of resolution of the constitutional issues raised by the Complaint in the state courts, since appellants were threatened with prosecution under statutes different from that under which they had been indicted (380 U.S. at 489).

In the present case, appellees have neither alleged nor made any showing that they had to risk prosecution to challenge the facial validity of Mass. Gen. Laws, ch. 272, 28A. Indeed — to the contrary — the Massachusetts Supreme Judicial Court has affirmatively invited such challenges to be made under the civil provisions of the Declaratory Judgment Act (Mass. Gen. Laws, ch. 231A). *Commonwealth v. Baird*, 1969 Mass. Adv. Sh. 727, 735, 247 N.E.2d 574, 580 (1969), certiorari denied, No. 707 Misc., O.T. 1969 (38 U.S.L.W. 3255). Moreover, appellees have neither alleged nor shown the wholesale misconduct and bad faith as detailed in the *Dombrowski* Complaint. Finally, appellees neither alleged nor showed — nor could they do so — that the issue which they requested the lower court to resolve could not have been resolved in one single judicial proceeding in the state courts.

Thus, in our view, a fair reading shows that the Complaint filed in this case is possibly similar to that filed in

Dombrowski only to the extent that, in both, a challenge was made to the overbreadth of the statute. But even in that regard, the allegations are clearly distinguishable. In *Dombrowski*, the statutes under attack—the Subversive Activities and Communist Control Law (La. Rev. Stat. §§ 14:358—14:374 [Cum. Supp. 1962]), and the Communist Propaganda Control Law (La. Rev. Stat. §§ 14:390-14:390.8 [Cum. Supp. 1962])—were clearly unconstitutional on their face under prior holdings of this Court if enforced as written. Cf. *Dennis* v. *United States*, 341 U.S. 494; *Yates* v. *United States*, 354 U.S. 298.[30] As later explained by this Court, the statutes under attack in *Dombrowski* were statutes which "were *patently* unconstitutional on their face . . . ." *Cameron* v. *Johnson*, 390 U.S. 611, 619 (Emphasis added).

This we regard to be the controlling distinction between *Dombrowski* and the present case. It is clear that—whatever else may be said—the Massachusetts obscenity statute (Mass. Gen. Laws, ch. 272, § 28A) is not *patently* unconstitutional on its face. Until this Court's decision in *Stanley*, no one seriously questioned the facial validity of that statute, or the accepted proposition that a state could properly prohibit commercial distribution of pornography. Even after *Stanley*, we are unaware of any court decision holding that a statute prohibiting commercial distribution of pornography is *patently* unconstitutional on its face.[31]

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[30] For example, Section 364(4) of the Subversive Activities and Communist Control Law made it a felony to contribute to a "subversive organization." Section 359(5) defined a "subversive organization" as one which, *inter alia*, *advocated* activities intended to overthrow the government. No distinction was made between "mere abstract advocacy" and "advocacy to action by language calculated to incite"—as required by the *Dennis* and *Yates* rationale.

[31] Significantly, this Court has never applied a facial invalidity test to statutes prohibiting commercial distribution of pornography, but has chosen to use an "as applied" test. If statutes relating to commercial distribution of pornography are *patently* unconstitutional, then

This is clearly understandable in view of this Court's specific reference to *Roth* in the *Stanley* decision, and the assertion that the former opinion retains its vitality in spite of the latter. Even the court below could not conclude that the statute was *patently* unconstitutional on its face. One judge dissented from the majority opinion. Moreover, even the majority recognized the uncertainly of the thrust of *Stanley*, stating "* * * that this is a decision of *probability*, not a *final holding* that that the Massachusetts statute is unconstitutional." (App. 36) (Emphasis added). In these circumstances, it can hardly be argued that the Massachusetts obscenity statute is *patently* unconstitutional on its face, or that the challenge to that statute is at all similar to that in *Dombrowski*.

In addition to the fact that appellees challenged the statute as overly broad, a majority of the court below found an alleged monetary loss and "chilling effect" as substantiating a showing of irreparable injury. In our view, neither factor—considered singly or collectively—warrants that conclusion.

Specifically, with respect to the alleged monetary loss, the majority state (App. 35-36):

> Even if money damages could be thought in some cases adequate compensation for delay, this defendant would presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset. (Footnote omitted).

That finding, however, finds no support whatsoever in the record below. As the dissenting opinion aptly points out,

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there was opportunity for this Court to have said so with respect to a related Massachusetts statute (Mass. Gen. Laws, ch. 272, §28B). See *Memoirs* v. *Massachusetts*, 383 U.S. 413. This Court instead chose to apply an "as applied" test. Even more significantly, in *Stanley*, the precurser of the present case, this Court apparently chose to apply an "as applied" test instead of a "facial validity" test.

"[t]here has been no showing of the extent of the monetary loss, if any, that [appellees] will suffer if they are not allowed to show the film." (App. 42). In our view—contrary to the fleeting suggestion of appellees (Motion to Affirm, pp. 20-21), and the apparent assumption of the majority below—the fact that box office receipts would be irretrievably lost absent injunctive relief is not a matter of common and general knowledge. There is not an iota of evidence showing that appellees could not have leased another film and still have maintained box office receipts in the same proportion and amount as gained through the showing of the film, "I Am Curious (Yellow)". Indeed, there was not even an allegation in the Complaint that appellees had made an effort to minimize further losses. Moreover, as the dissenting judge further correctly pointed out, characterization of the film as a diminishing asset added nothing to appellees' case. The film itself was owned by Grove Press, Inc.—which was not a party to the action—and not by appellees. And—again—the record was simply bare of any evidence tending to establish the value of the film.

The majority further held that the "chilling effect" upon others was relevant to a determination of irreparable injury. As has been noted by Mr. Justice Harlan, however, the "chilling effect" doctrine is an "ubiquitous and slippery" one. *Zwickler* v. *Koota*, 389 U.S. 241, 256, n. 2 (concurring opinion). Its relevance to the present case is extremely doubtful. The court below assumed that the film itself was obscene—i.e., "utterly without redeeming social value." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418. Thus, we find it extremely difficult to conclude that—by denying prospective patrons an opportunity to view a film which is utterly without redeeming social value, indeed, a film having no First Amendment protection—the statute operates as a "chilling effect."

In short, appellees completely failed in making a showing of irreparable injury, and thus fell far short of making out a cause of action in equity warranting the extraordinary remedy of injunction against a state law enforcement officer administering the state law in good faith. The majority below therefore abused its discretion in granting injunctive relief. *Douglas, supra.*

C. In The Circumstances Of This Case, The Court Below Should Have Abstained From Passing On The Facial Validity Of Mass. Gen. Laws, ch. 272, §28A, Until That Statute Was Passed Upon By The Massachusetts Supreme Judicial Court.

In any event—even if the appellees made out a cause of action in equity otherwise warranting the issuance of injunctive relief—the court should have abstained until the matter was passed upon by the Massachusetts Supreme Judicial Court.[32] This Court has repeatedly indicated that abstention is appropriate where litigation in the state court would avoid an unnecessary decision by the federal court of a serious constitutional question, or where it would present the constitutional question in a completely different posture. *Harrison* v. *NAACP*, 360 U.S. 167; *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-189; *Zwickler* v. *Koota*, 389 U.S. 241, 251, n. 14, and 389 U.S. at 255-256 (concurring opinion of Mr. Justice Harlan). This is especially true where a challenged statute is fairly susceptible to construction which would readily eliminate the constitutional objection. *Id.* As noted above, appellees made a broadside challenge to the facial validity of Mass. Gen. Laws, ch. 272, §28A. In view of the nature of the challenge, appellants moved the court below to abstain pending further proceedings—and possible construction of

[32] See footnote 27, *supra.*

the statute—in the state courts. A majority of the court below ruled that the abstention doctrine was not applicable in the circumstances of the case.

In our view, the majority below abused its discretion in denying the motion to abstain. In the posture of the case as presented to the court below—i.e., challenging the facial validity of the statute—the court was obligated to either condemn the entire statute as written [and previously construed by the Massachusetts Supreme Judicial Court], or to approve it. The nature of the challenge left no room for a middle ground approaching, since that court was obviously without judicial power to construe the state statute. It could not—as could the state court—judicially carve the statute in order, assuming that the *Stanley* rationale reaches as far as intimated by the court below, to separate the good from the bad.

The present statute under challenge (Mass. Gen. Laws, ch. 272, §28A) is fairly susceptible to construction which would make it consistent with First Amendment considerations—again assuming that *Stanley* is applicable to commercial distribution of pornography. The majority of the court below concluded that prosecution under the statute would be consistent with First Amendment limitations if the distributor or exhibitor "pandered" his wares.[33] Clearly, it would do no violence to the statute to construe it as being applicable to cases in which an element of pandering was present. It is clear that the legislature did not intend to forfeit the right to prosecute commercial distribution of pornography in a pandering context if there could be no prosecution against commercial distribution in a non-pandering context. Moreover, this Court, as did the court below, has held that commercial distribution of pornography in a manner which exposes an unwilling person to it can be prosecuted consistent with First Amendment

[33] But see footnote 4, *supra*.

limitations. See *Redrup* v. *New York*, 386 U.S. 767. Again it is clear that the legislature did not intend to forfeit the right to prosecute such "offensive" distributions, even if there could be no prosecution for non-offensive or non-pandering distributions, and thus, the Massachusetts Supreme Judicial Court could have construed the statute in conformity with this clear legislative intent.

The Massachusetts Supreme Judicial Court has not, in the past, shown its reluctance to construe that statute in order to meet constitutional mandate. Thus, following this Court's decision in *Smith* v. *California*, 361 U.S. 147, the Massachusetts Supreme Judicial Court construed the statute as requiring *scienter* so as to avoid future constitutional conflict. See *Demetropolis* v. *Commonwealth*, 342 Mass. 658, 175 N.E.2d 259. On other similar occasions, the Massachusetts Supreme Judicial Court has striven to narrowly construe statutes to save its constitutionality in the face of emerging First Amendment doctrine. Thus, in *Alegata* v. *Commonwealth*, 353 Mass. 287, 302-304, a challenge was made to the constitutionality of the "disorderly conduct" statute (Mass. Gen. Laws, ch. 272, §53). There the court narrowly construed the statute so as to eliminate any First Amendment objection. And, in so construing that statute, the court gave it the same meaning as given to the concept of "disorderly conduct" by Section 250.2 of the Model Penal Code (Proposed Official Draft), even though that definition obviously was not available to the legislature when the statute was originally enacted in 1943. Moreover, in *Commonwealth* v. *Baird*, 1969 Mass. Adv. Sh. 727, 247 N.E.2d 574 (1969), certiorari denied, 38 U.S.L.W. 3255, the Massachusetts Supreme Judicial Court construed a statute (Mass. Gen. Laws, ch. 272, §21) prohibiting the exhibition of contraceptive devices as not prohibiting exhibition which is in any manner connected with a speech

—again in an obvious attempt to make that statute conform with emerging constitutional doctrine.

In short, the statute under attack in the present case is one which is fairly susceptible to constitutional construction, and the Massachusetts Supreme Judicial Court has always assumed its rightful role of construing state statutes consistent with First Amendment considerations. Abstention was therefore appropriate. *Harrison* v. *NAACP, supra; County of Allegheny* v. *Frank Mashuda Co., supra.*

Nothing in this Court's decisions in *Zwickler* v. *Koota,* 389 U.S. 241 [upon which the majority of the court below relied (App. 36)], or *Dombrowski* v. *Pfister,* 380 U.S. 479, is to the contrary. In *Zwickler,* it was conceded by all parties that the statute under challenge simply was not susceptible to further construction by the state courts (389 U.S. at 250). Cf. *Aptheker* v. *Secretary of State,* 378 U.S. 500. *Dombrowski* is likewise inapposite. In that case, the appellants alleged that the appellees threatened to prosecute them in bad faith "without any hope of ultimate success, but only to discourage appellants' civil rights activities." (380 U.S. at 490). In the present case, appellees never challenged the good faith of appellant Garrett H. Byrne; indeed, in view of the conflicting opinions concerning the obscenity *vel non* of the motion picture, "I Am Curious (Yellow)", appellant's good faith cannot be gainsaid. Likewise in *Dombrowski,* this Court found that the statutes there challenged could not be construed by the state courts in a single proceeding (380 U.S. 491). In the present case, the issues which appellees raised in the court below could be fully and readily resolved on their appeal from the convictions in the Massachusetts Superior Court. Indeed, those issues could have been fully resolved in a single *civil* proceeding had they accepted the clear invitation of the Massachusetts Supreme Judicial Court and sought a declaratory judgment pursuant to the provisions

of Mass. Gen. Laws, ch. 231A. See *Commonwealth* v. *Baird*, 1969 Mass. Adv. Sh. 727, 735, 247 N.E.2d 574, 580 (1969), certiorari denied, 38 U.S.L.W. 3255. Finally, in *Dombrowski*, the appellants challenged as overbroad a series of statutes which this Court later explained were *patently* unconstitutional on their face. See *Cameron* v. *Johnson*, 390 U.S. 611, 619. As has been more fully pointed out above, pp. 33-34, it is clear that the statute here under challenge cannot be fairly characterized as *patently* unconstitutional on its face. Thus, nothing in the controlling decisions of this Court precluded application of the abstention doctrine, and the majority of the court below abused its discretion in denying the motion to abstain.

Conclusion

For the reasons stated above, it is respectfully submitted that the judgment below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1149

GARRETT H. BYRNE, ET AL., APPELLANTS

v.

SERAFIM KARALEXIS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

An important aspect of the holding of the court below was its decision that a publication (here, a movie) [1] assumed to be obscene could be commercially

[1] Involved in the case is the film "I Am Curious (Yellow)," which the court below assumed to be obscene under current legal standards (see A. 33). The government takes no position regarding the obscenity of this movie (see *United States* v. *A Motion Picture Film Entitled "I Am Curious-Yellow,"* 404 F. 2d 196 (C.A. 2); see also *Grove Press, Inc.* v. *Maryland Board of Censors*, No. 905, this Term, probable jurisdiction noted, March 23, 1970). Whatever might ultimately be concluded as to the obscenity of the film does not detract from the concreteness and substantiality of the issue presented as to the meaning and effect of *Stanley* v. *Georgia*, 394 U.S. 557, nor indicate

distributed without the possibility of a governmental interference as long as the distributors observed certain restrictions. According to the district court, all that was required to obtain First Amendment protection was that minors be excluded; that no pandering advertisements be made; that the public be adequately notified of the possible offensiveness of the publication so as to avoid any unwanted intrusion upon its sensibilities; and, implicity, that the distribution take place at a location where only those wishing to participate had any reason to attend. The court believed that this part of its holding was a logical consequence of this Court's decision last Term in *Stanley* v. *Georgia*, 394 U.S. 557. The court below reasoned that *Roth* v. *United States*, 354 U.S. 476—which permitted state and federal prosecution in relation to all forms of commercial distribution of obscene materials—has been qualified, despite this Court's explicit statement in *Stanley* that no such limitation was intended (394 U.S. at 568).

This holding is of interest to the United States since it brings into question the validity of the array of federal statutes which punish the interstate distribution (18 U.S.C. 1461–1465) and prohibit the importa-

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that the Court should proceed first to resolve whether the film is obscene before considering that question. The *Stanley* issue was considered and decided by the court below, and is one that all lower courts, both state and federal, must of necessity deal with in every obscenity case. It is properly presented for decision here (unless appellants' arguments with respect to the jurisdiction of the district court, on which—without intending to reflect thereon—we take no position, are sustained), and should accordingly be considered and resolved, without regard to whether "I Am Curious (Yellow)" is or is not obscene.

tion (19 U.S.C. 1305(a)) of obscene matter without the limitations the court below concluded were constitutionally required. Indeed, the effect of a similar interpretation of *Stanley* by a three-judge district court in California has resulted in a holding by that court that one of the federal obscenity statutes is unconstitutional on its face—even though the claimant in that case stipulated that he had imported the photographs in question for commercial distribution. *United States* v. *Thirty-Seven Photographs*, Civil No. 69–2242–F (C.D. Cal.).[2] While we have noted an appeal in *Thirty-Seven Photographs*, and will file our ~~Initial~~ Jurisdictional Statement shortly in that case, the case will not be reached and decided until next Term. Accordingly, it seems appropriate to state our views presently as to the reach of *Stanley* and its impact, if any, on *Roth*.

QUESTION PRESENTED

Whether this Court's recent decision in *Stanley* v. *Georgia*, 394 U.S. 557, effectively undermined the doctrine of *Roth* v. *United States*, 354 U.S. 476, pursuant to which federal and state governments were authorized, consistent with the First Amendment, to prohibit the public dissemination of obscene matter.

STATEMENT

The instant case arises from the efforts of the Boston exhibitors of the movie "I Am Curious (Yellow)" to prevent their prosecution under a Massachusetts ob-

[2] The validity of the customs statute under *Stanley* is also *sub judice* before a three-judge court in the Southern District of New York. *United States* v. *Various Articles of Obscene Merchandise*, Civ. No. 68–2972 (S.D.N.Y.).

scenity statute making the importation, publication, and distribution of obscene matter, or possession for such purposes, a criminal offense (Mass. Gen. Laws, Ch. 272, § 28). While other questions are raised by the parties, the crucial aspect of the holding below, insofar as the government is here concerned, is the district court's conclusion that "*Roth* remains intact [after *Stanley*] only with respect to public distribution in the full sense [of obscene matter], and that restricted distribution, adequately controlled, is no longer to be condemned" (A. 35). This conclusion was premised on the following factual findings (A. 32):

> Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg* v. *United States*, 1966, 383 U.S. 463. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

Based on those findings, the court below concluded that the Massachusetts statute could not be constitutionally applied to the exhibitors even if the film were obscene, which was assumed for purposes of its decision (see note 1, *supra*). It reasoned that *Stanley* v. *Georgia*, *supra*, recognized a constitutional "right to receive" or view obscene materials; that there must be, as a result, some right of public distribution of such materials so that they might be received; and that therefore any distribution is constitutionally protected which does not involve the matters recognized in *Stan-*

ley as properly subject to governmental regulation—dissemination that might reach minors; distribution likely to intrude upon and offend unwilling members of the public; and (by implication) pandering advertisements (see 394 U.S. at 567).[3] Since the court below found that none of these matters was involved here, it determined that the film's distribution was constitutionally protected, and temporarily enjoined appellants from interfering with that distribution so long as the mode of distribution remained the same.[4] One judge dissented, stating that nothing in *Stanley* was intended to limit or undermine *Roth* (A. 38–41).

INTRODUCTION AND SUMMARY OF ARGUMENT

As noted previously, the concern of the United States in this case relates to the meaning and scope of *Stanley* v. *Georgia, supra,* and its impact, if any, on *Roth* v. *United States, supra.* It is our view that in *Stanley* this Court meant only to hold what it said it was holding: that governmental authority may not lawfully interfere with an individual's right privately to possess obscene materials in his home. It did not, we submit, emasculate the *Roth* doctrine by further holding, as the district court concluded, that those who publicly distribute obscene materials are entitled to First Amendment protection where they place "adequate" controls, reflective of other decisions of this Court in the obscenity context, on the distribution of such materials.

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[3] See *Ginsberg* v. *New York*, 390 U.S. 629; *Redrup* v. *New York*, 386 U.S. 767; *Ginzburg* v. *United States*, 383 U.S. 463.

[4] An application to stay the temporary injunction was granted by this Court on December 15, 1969 (396 U.S. 976).

ARGUMENT

Nothing in *Stanley* v. *Georgia*, we submit, was intended to provide constitutional protection for the public dissemination—as distinguished from private possession—of obscene materials.

1. We start with the decision in *Stanley* itself. In that case state agents entered the appellant's home acting under a search warrant authorizing them to seize evidence of bookmaking activity. In the course of their search they came upon a roll of movie film and a projector. Upon viewing the film they concluded that it was obscene and arrested the appellant. He was thereafter convicted under state law (Ga. Code Ann. 26–6301 (Supp. 1968)) for "knowingly hav[ing] possession of * * * obscene matter," and the Supreme Court of Georgia affirmed (see 394 U.S. at 558–559). Proceeding on the assumption that the film was obscene under "any of the tests advanced by members of this Court" (394 U.S. at 559, n. 2), the conviction was reversed by this Court. The express holding of the majority was that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" (*id.* at 568).[2] The Court's

[2] Mr. Justice Black concurred on the ground that the First Amendment bars government from making any law restricting speech or press, whether termed obscene or not (394 U.S. at 568–569). Mr. Justice Stewart, joined by Mr. Justice Brennan and Mr. Justice White, concurred on the ground that the search and seizure violated the express guarantees of the Fourth Amendment made applicable to the states under the Fourteenth Amendment under *Mapp* v. *Ohio*, 367 U.S. 643, in that the search for and seizure of the film exceeded the limits authorized by the warrant (see 394 U.S. at 571–572).

opinion made plain that the decision was essentially grounded on a combination of the Fourth Amendment proscription on "unwanted governmental intrusions into one's privacy" (*id.* at 564) and the First Amendment prohibition of government "control [over] the moral content of a person's thoughts" (*id.* at 565). As the Court phrased the issues posed in the case (394 U.S. at 565):

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library * * *. If the First Amendment means anything, it means that a State has no business telling a man sitting alone in his own house, what books he may read or what films he may watch.[6]

At the same time, however, the majority expressly disavowed any intent to limit the *Roth* doctrine. It pointed out that neither *Roth* nor the cases which had followed it had involved "a statute punishing mere private possession of obscene material," but rather had dealt "with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter" (*id.* at 561; see also *id.* at 563–564, 566). Indeed, the Court explicity stated at the conclusion of its opinion: "*Roth* and the cases following that deci-

[6] Just preceding the language quoted in the text the Court had quoted from Mr. Justice Brandeis' well-known dissent in *Olmstead* v. *United States*, 277 U.S. 438, 478, a Fourth Amendment case.

sion are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home" (*id.* at 568).

Despite the explicit disclaimer in *Stanley* of any intent to impair *Roth*, the court below nevertheless found that the decision in *Stanley* necessarily had that effect. The court below reached its conclusion by reasoning that, since this Court had held that the appellant in *Stanley* was protected by the First Amendment even though the material in his possession was assumed to be obscene, the Court must, at least in part, have rejected the statement in *Roth* (354 U.S. at 485) that "obscenity is not within the area of constitutionally protected speech or press" (see A. 34). The court below buttressed its argument by relying upon *Stanley*'s rejection of the "clear and present danger" argument in attempted justification of the Georgia possession statute, and upon *Stanley*'s examples of legitimate state concern that obscenity not fall into the hands of children or intrude upon the privacy of the general public as support for the view that a distributor who provides against such dangers is entitled to constitutional protection against prosecution for violation of obscenity statutes. The court below concluded (A. 35):

> [W]e think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned.

> It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. * * * If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.

2. It is our submission that the district court's analysis misconceives the carefully reasoned rationale and limited holding of *Stanley*. This Court was not there saying that materials otherwise obscene are somehow rendered non-obscene because they are privately possessed; rather, it was protecting an individual's right to read or view materials, whether or not they might be subject to the obscenity laws in a different context, in the privacy of his home. Nor was the Court there holding that commercial sources of obscene materials are necessarily free from governmental sanction in order that the personal taste of a prospective purchaser could be satisfied; *Stanley* simply does not speak to this question, despite the Court's passing reference to "the right to receive information and ideas" (394 U.S. at 564).

In our view, *Stanley* teaches that government cannot constitutionally interfere with an individual's private possession of obscene materials in his own home, and that the absence of such authority has nothing to do with the obscenity *vel non* of the materials, but

only with "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man" (*Olmstead* v. *United States*, 277 U.S. 438, 478 (Brandeis J., dissenting); see 394 U.S. at 564). This, we take it, is what the Court in *Stanley* was addressing itself to when it emphasized a person's right to be free from governmental intrusion into his library or the "moral content" of his thought. As the Court put it: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (*id.* at 565–566).

It does not follow, however, that this right to be free from governmental interference with the private possession of obscenity carries with it the right to disseminate obscene materials to those desiring them. It is not the content of concededly obscene matter that is entitled to protection under *Stanley*, but simply the unfettered right to read or view what one will when "sitting alone in his own house" (*id.* at 565), however and wherever it might have been obtained. It is this crucial distinction between public distribution and private possession which the Court drew in *Stanley* when it stated: "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" (*id.* at 566).

In short, *Stanley* did not hold that the right privately to possess obscene matter created a correlative right publicly to dispense it.[7] It held only that once such ma-

[7] As this Court has pointed out, albeit in a somewhat different context, "The ability to waive a constitutional right

terials are obtained, irrespective of the fact that they are obscene under any legal test, or were obtained from an unlawful source, the state may not prosecute the possessor for his possession. Such a construction gives full force to the rationale of *Stanley* and at the same time retains the opinion's internal consistency by leaving *Roth* and it progeny intact. *Stanley* did not, in our view, adopt the standard applied by the district court that public distribution of obscene material is constitutionally permissible where the distribution is "adequately controlled" (A. 35).[6] On the contrary, it did not deal with the question of public distribution at all, and the standard in that regard still remains the one developed in *Roth* and the cases that follow it.[7]

---

does not ordinarily carry with it the right to insist upon the opposite of that right" (*Singer* v. *United States*, 380 U.S. 24, 34–35).

[6] A number of incongruities flow from the district court's determination that even obscene materials are entitled to constitutional protection, so long as certain factors—*inter alia*, pandering advertisements—are not present. But in *Ginzburg* v. *United States*, 383 U.S. 463, the Court ruled that the manner of distribution (*i.e.*, pandering) was there relevant to determining the obscenity *vel non* of the challenged materials. In this respect, then, the court below has construed *Stanley* as overturning not only *Roth* but *Ginzburg* as well. Unless pandering itself is made a discrete crime, the lower court's caveat in this regard seems to involve a logical inconsistency (see Appellants' Br. 11, n.4).

[7] In the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418, the applicable standard was defined as follows:

"[T]hree elements must coalesce: it must be established that (*a*) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (*b*) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (*c*) the material is utterly without redeeming social value."

3. It might be suggested, we recognize, that the foregoing analysis constitutes an oversimplification of a considerably more complex problem. See, *e.g.*, Katz, *Privacy and Pornography: Stanley* v. *Georgia*, 1969 Sup. Ct. Rev. 203. It is undisputed that the crucial issue here revolves about the lower court's initial legal premise, that *Stanley* recognizes a constitutional "right to receive" materials which are "obscene" in the sense defined by *Roth* and this Court's subsequent decisions following *Roth* (see note 9, *supra*). If there is a right, as such, it is then difficult to contend, under this Court's cases, that there is no corresponding right of dissemination, at least under some circumstances. But while there is language in *Stanley* indicating a recognition of such a right (see 394 U.S. at 564), other language stresses that the government's power to regulate the distribution of obscenity, recognized by *Roth*, remains unimpaired (394 U.S. at 568; see *supra*, pp. 7–8). Properly considered, *Stanley* recognized no constitutional "right to receive" obscene materials; rather, it was premised on a constitutional disability on the part of government to examine the contents of a person's home or office, and attempt to base obscenity prosecutions on materials found there.[10]

The distinction between a "right to receive" and a disability to search, seize and then punish may appear subtle, but is of crucial importance. The claim for a "right to receive" obscene matter

[10] Indeed, it might well be thought that the situation in *Stanley* essentially involved conduct (possession and use of materials) rather than speech (communication of ideas to others by means of writings, films, etc.), and that the First Amendment was relevant principally because it had been charged that the materials involved were obscene.

> misconceives the reasons for which, according to *Stanley*, society stays its hand in the case of private indulgence. It does not acknowledge a "right" to undergo pornographic experiences in private any more than the statute of frauds grants a "right" to breach oral contracts. The law tolerates both because of uniquely remedial considerations. The cure would be worse than the disease. The recognition of this does not mean that society either values the disease or considers it with indifference. Should the repellent activity surface in circumstances not relevant to privacy the law will step in. The privilege recognized in *Stanley* is, in short, a shield for the private citizen, not a sword for the purveyor. [Gegan, *The Twilight of Nonspeech*, 15 Catholic Lawyer 210, 218–219 (1969).]

Thus, we submit, the central thought of *Stanley* is not that the particular books or films an individual has and uses in the privacy of his home or office constitute "speech" protected by the First Amendment (see note 10, *supra*), but rather that the panoply of values which the First Amendment, the Fourth Amendment, and other provisions of the Bill of Rights, seek to protect (cf. *Griswold* v. *Connecticut*, 381 U.S. 479) would be too endangered by the necessarily intrusive inquiry to determine what they comprise.[11]

[11] Even though obscene materials may not constitute speech protected by the First Amendment, the history of obscenity cases in this Court teaches that obscenity is rarely self-identifying; there must be careful examination to determine the issue in each case, and on one side of the line the materials involved are protected. Even absent the threat posed to this protected area by such searches, there would be little purpose served by searching through one man's library—of materials probably already read—to determine on which side of the line individual materials there fell. Given that threat, it is patent that such inquiries cannot be entertained.

Reluctance to permit the state to search through a man's private papers and other forms of communication has a long and distinguished constitutional history. In *Boyd* v. *United States*, 116 U.S. 616, 630, that concern emerged in the form of a relationship between the Fourth and Fifth Amendments; the Fifth Amendment's protection against self-incrimination was held, in effect, to make any search of a person's private papers—where testimonial and communicative in character—unreasonable *per se*:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime * * * is [impermissible]. In this regard the Fourth and Fifth Amendments run almost into each other.

That reluctance also found expression, in a dissent which has since acquired great force—that of Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438, 478—as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." That right, again, is not a legal blessing on what one is doing, but a right not to be interfered with in doing it under private circumstances, a right not to suffer the fear of state intrusion or punishment. It has to do with the First Amendment, then, where books or films are involved and an obscenity prosecution is threatened, but also with the Fourth and Fifth Amendments.

Recent cases in this Court, recognizing a shift in focus on Fourth Amendment issues from property to privacy (cf. *Katz* v. *United States*, 389 U.S. 347, 352–353), have carefully preserved this special aspect of private papers, as materials generally protected against governmental inquiry, search, and seizure. Thus, *Schmerber* v. *California*, 384 U.S. 757, 763–764, in drawing a line between evidentiary searches and testimonial compulsion, was careful to preserve the protection of the privilege to "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." So, also, *Warden* v. *Hayden*, 387 U.S. 294, 303, in overruling cases which had held that searches and seizures could not, under the Fourth Amendment, extend to "mere evidence," nonetheless intimated that certain evidence might not be subject to seizure because its "very nature precludes [it] from being the object of a reasonable search and seizure." The reference was evidently to private papers, the subject of such special protection since *Boyd*.

While the *Stanley* opinion relies principally on the First Amendment rather than the Fourth, we think similar reasoning was of necessity controlling there. Indeed, the right of privacy—the focus of the modern Fourth Amendment—is central to the Court's reasoning in *Stanley*: A search through an individual's books and films to determine which if any might be obscene necessarily takes on aspects which run counter to the central purpose of the Fourth Amendment. Such a search, if not carefully restricted, may expose matters other

than what is being searched for—matters in which the state has no legitimate interest whatever. That sort of intrusion, in turn, implies a supervision of and a chilling effect upon communications, an effect inimical to a free society. Thus, the search found barred by the Fifth Amendment in *Boyd* might also have been barred by the First. And, in the present context, the state's uncertain and undefined interest in learning whether one individual possesses obscene matter for his own use cannot justify the impingement on protected activities that might otherwise result.

Very different considerations apply in the case of commercial distribution of potentially obscene matter. No corresponding right of privacy in places of business open to the public—such as theaters and bookstores [15]—has ever been recognized, and the search for and seizure of materials presented for public dissemination gives rise to no risk that the state will learn what could permissibly be kept from it. One person need not know what is in another's library or desk; but no matter how discreet the storefront or marquee, if the public is informed of the potential offensiveness of what is behind it—as under the district court's decision it must be—there will be many who find that information alone alarming and upsetting. Moreover, while the state may have no sufficient interest in the morality of an individual citizen already in possession

[15] It is difficult to take seriously the district court's suggestion of an equal protection notion operative in this context (see A. 35). The fact is, of course, that a "rich Stanley" can possess and enjoy in the privacy of his home a number of things that a "poorer Stanley" cannot. There is hardly an equal protection right of access to obscene matter.

of materials assumed to be obscene, it does not follow that it has no legitimate interest in the morality of the public at large, and in preserving it from influences which may be harmful to it (Gegan, *supra*, 15 Catholic Lawyer at 218; Appellants' Br. 25–30). *Roth* dispositively established that it is entitled to do so by prohibiting the distribution of matter which is "obscene". Thus, we submit, *Stanley's* disclaimer of any purpose to modify *Roth* in its application to the commercial distribution of pornography can and should be honored. *Stanley* recognized that, for important and compelling reasons, the state has no right to intrude into a private home or office in search of obscenity. That the owner of those places has a constitutional right against intrusion into them does not mean, however, that he has a First Amendment right, as such, to have everything which might otherwise be found there. The First Amendment protects materials otherwise obscene in such circumstances because of the risks to privacy, to protected speech and thought, which would be presented by a governmental search. It does not follow that an individual has a "right to ~~receive~~" obscene materials. It cannot therefore be argued, we submit, that there is any First Amendment right to disseminate such materials.

Finally, even assuming *arguendo* that there is such a protected right to receive obscene materials, it is plainly, under *Stanley*, a personal right that attaches only to the individual who seeks and desires to receive such matter. Commercial distributors of obscene materials simply lack the requisite standing to assert such

a right.[13] Thus, even under this analysis, disseminators of pornography could not claim the protection from criminal prosecution for possession of, or for receiving, obscene materials, that an individual would possess. To say that an individual could not be punished for purchasing an obscene book or film is far different from concluding that the seller would be entitled to share in this protection. There is no constitutional illogic in holding that an exhibitor of an obscene movie could be enjoined from and prosecuted for doing so, but that individuals attending such a showing would not share in his criminal culpability. Pressed to the utmost, *Stanley* surely stands for no more than this.

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[13] Nothing in *Griswold* v. *Connecticut*, 381 U.S. 479, is to the contrary on the question of standing. Although those giving advice regarding contraception were allowed there to assert the constitutional rights of the married persons, the Court specifically noted that the appellants had been tried and convicted "for serving married couples in violation of an aiding-and-abetting statute," and concluded that "[c]ertainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime" (*id.* at 481).

CONCLUSION

For the foregoing reasons, and assuming that the Court reaches the question here discussed, the judgment of the district court should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE, District Attorney for Suffolk County, City of Boston, Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

Appellants,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC.,

Appellees.

On Appeal from the United States District Court for the District of Massachusetts

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1149

GARRETT H. BYRNE, District Attorney for Suffolk County, City of Boston, Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

Appellants,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC.,

Appellees.

On Appeal from the United States District Court for the District of Massachusetts

MOTION FOR LEAVE TO FILE A BRIEF BY THE AMERICAN CIVIL LIBERTIES UNION and the CIVIL LIBERTIES UNION OF MASSACHUSETTS AS AMICI CURIAE

1. The proposed *amici* are organizations dedicated to the preservation and extention of civil liberties, particularly the freedoms protected by the Bill of Rights of the United States Constitution.

2. This case presents questions of the permissible boundaries of state criminal prosecution, on grounds of obscenity, of distributors and exhibitors of motion pictures. The interest of proposed *amici* is to assure that state action in this area be narrowly confined to that which is necessary

to safeguard legitimate state interests. Proposed *amici* maintain that such an approach is necessary to avoid the massive chilling effect on freedom of expression which results from overly broad state proscription of communication on obscenity grounds.

3. The argument of proposed *amici*, that the Court below correctly enjoined enforcement of the Massachusetts statute because that statute was far more restrictive of First Amendment rights than is necessary to protect legitimate state interests, has been made in those terms by no party herein and, on the basis of conversations with appellees' counsel, we believe will not be made in appellees' Brief.

4. This argument is relevant to the disposition of this case because it rationalizes the decision of the Court below on a ground which has repeatedly been utilized by this Court in First Amendment cases challenging state statutes for overbreadth.

5. Appellees have consented to the filing of the attached *amicus* Brief; however, the appellants have advised proposed *amici* that they refuse to consent to its filing.

6. For these reasons, under Rule 42(3) of the Rules of this Court, the American Civil Liberties Union and the Civil Liberties Union of Massachusetts hereby move that this Court issue an order authorizing the filing of the attached proposed Brief *amicus curiae* under Rule 42(2).

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1149

GARRETT H. BYRNE, District Attorney for Suffolk County, City of Boston, Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

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SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC.,

Appellees.

On Appeal from the United States District Court for the District of Massachusetts

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, AS AMICI CURIAE

INTEREST OF AMICI

The American Civil Liberties Union ("ACLU") is an organization dedicated to the preservation and extension of civil liberties and, particularly, the freedoms protected by the Bill of Rights of the United States Constitution. The Civil Liberties Union of Massachusetts is an affiliate of ACLU dedicated to the same objectives within the Commonwealth of Massachusetts.

This Brief is filed because this case involves the question of the permissible scope of state restriction upon free expression in the medium of motion pictures. It appears to the *amici* that the exhibition of a motion picture only to adults forewarned of its possible offensiveness is protected by the First Amendment and cannot be made the basis of criminal sanctions. The Massachusetts law in issue imposes criminal sanctions on such exhibition and, thus, unreasonably curtails the freedom of expression and freedom to receive ideas and information which are a vital basis of a libertarian and open society.

In addition, *amici* are concerned that federal courts not, as suggested by Appellants, be forced to abstain from making determinations of the constitutionality of state criminal laws while those laws are being actively used to chill freedom of expression. If there exist some forms of expression which are "obscene" and, therefore, outside First Amendment protection, that Amendment—so as to protect communicators of the nonobscene—at the least requires procedural safeguards against a chilling and burdensome multiplicity of litigation.

STATUTE INVOLVED

Mass. Gen. Laws, ch. 272, § 28A, provides:

> Whoever imports, prints, publishes, sells, or distributes a pamphlet, ballad, printed paper, phonographic record, or other things which are obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image, or description, or buys, procures, receives, or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image, or other thing, for the purpose of sale, exhibition, loan, or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction.

STATEMENT

A three-judge panel of the United States District Court, District of Massachusetts, in the Order appealed from, preliminarily enjoined prospective enforcement against plaintiffs of Mass. Gen. Laws, ch. 272, § 28A. This ruling was grounded upon a finding that the statute was probably unconstitutional as violative of the First Amendment and that plaintiffs would be irreparably injured if the injunction did not issue. Finally, the District Court held that staying its decision until the Supreme Judicial Court of Massachusetts ruled on the constitutionality of the statute—*i.e.*, abstention—would be improper.

The Massachusetts statute in question makes criminal (penalties: up to five years in jail and/or up to $5,000) the "possession [or] . . . any obscene . . . print, picture, figure, image . . . for the purpose of . . . exhibition . . . ." The plaintiffs (appellees) are exhibitors of motion pictures at two theaters in Massachusetts. They were prosecuted at least twice, convicted once (one plaintiff was sentenced to jail for one year) and threatened with additional prosecutions based upon their theaters exhibiting the motion picture *I Am Curious (Yellow)* only to adults who were forewarned of the picture's possible offensiveness.[1]

QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, a state may prohibit exhibiting a concededly obscene motion picture to adults who are aware of its potential offensiveness.

2. Whether federal courts should, or can, abstain from ruling upon the constitutionality of a state statute, or enjoining the statute's enforcement upon finding of unconstitutionality, when to do so would irreparably injure the First Amendment rights of the plaintiff and the public.

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[1] The alleged obscenity of that motion picture has been the subject of numerous litigations at the federal, state and local levels; the issue is now pending before this Court in *Grove Press, Inc., v. Maryland State Board of Censors*, No. 905, this Term.

SUMMARY OF ARGUMENT

I. The dangers of adult exposure to obscene matter have been narrowly defined by this Court. *Redrup v. New York*, 386 U.S. 767 (1967). The states may regulate on obscenity grounds the distribution and consumption of communicative material only to the extent necessary to meet those dangers. Since those dangers may be effectively cured short of outright prohibition of exhibition of a film to adults, the state statute in issue was correctly found by the Court below to suffer from overbreadth and therefore to violate the First Amendment.

II. The burdens on free expression created by multiple state obscenity prosecutions are immense. Therefore, the federal courts must, wherever the constitutionality of a state obscenity statute is legitimately put in issue, rapidly rule upon that question so as to minimize chilling effect.

ARGUMENT

I.

A STATE MAY NOT PROHIBIT THE EXHIBITION OF OBSCENE MOTION PICTURES TO ADULTS WHO ARE AWARE OF THEIR POTENTIAL OFFENSIVENESS

The Court below held that the Massachusetts statute, by prohibiting the "public" (theater open to the public), but restricted (public forewarned of the film's possible offensiveness and theater policed to exclude minors) exhibition of a motion picture, violated the First Amendment. This finding was grounded upon the reasoning of this Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that a state cannot punish a man's possession or viewing of an obscene film in the confines of his home.

Assuming *arguendo* that a film or printed material may be obscene[2] and, therefore, entitled to less protection under the

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[2]This assumption is contested by *amici* on the ground that the standard for obscenity formulated by this Court is too vague and subjective to satisfy due process requirements and that there is no sound

First Amendment than nonobscene communication, may a state ban the distribution of such materials to adults who are warned of possible offensiveness? *Amici* suggests that this question must be answered "no". *Stanley* recognizes that the First Amendment (not the Fourth Amendment as suggested by appellants and the United States as *amicus*) protects "private" consumption of obscenity. It seems clear that the viewing of a film by forewarned adults in a movie theater is "private" enough, in the sense that none of the dangers which can justify governmental regulation of obscenity are present, to meet the *Stanley* rationale.

The *Stanley* case is the latest in a line of attempts by this Court to define the scope of applicability of *Roth v. United States*, 354 U.S. 476, 485 (1957), which held that the government may restrict the dissemination of obscene *albeit* communicative material because "obscenity is not within the area of constitutionally protected speech or press." The efforts to limit the chilling effect of the *Roth* rule upon First Amendment freedoms have been threefold: (1) obscenity was narrowly defined in *Roth* and has been narrowed even further by such decision as *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966); (2) procedural safeguards have been spelled out against restrictions upon the distribution and exhibition of books: *e.g., Marcus v. A Search Warrant*, 367 U.S. 717 (1961) and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), and motion pictures: *e.g., Freedman v. Maryland*, 380 U.S. 51 (1965) and *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); and (3) attempts have been made to spell out the dangers posed by obscenity which justify state prohibition: *e.g., Redrup v. New York*, 386 U.S. 767 (1967), and accordingly circumscribe the constitutionally permissible range of state prohibition, *Stanley*, *supra*.

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reason to place any erotic or scatological communication outside the protections of the First Amendment. See *Memorandum of the ACLU and the Maryland Civil Liberties Union as Amici* in No. 905, this Term.

The ACLU, as *amicus*, has urged this Court in such cases as No. 905, this Term, and *Jacobellis v. Ohio*, 378 U.S. 184 (1964) that obscenity is a concept which cannot be applied to expression in a manner consistent with the requirements of due process and that exclusion of obscenity from First Amendment protection is neither constitutionally nor socially justifiable. However, *amici* will not argue those issues herein, but will confine their analysis to the narrower issues raised by this case.

The second approach, defining procedural safeguards, is pertinent to Part II of this Brief, discussing abstention.

Finally, we address the need for examining the dangers of obscenity which justify relaxation of First Amendment protection. In *Redrup v. New York*, 386 U.S. 767, 769 (1967), this Court carefully and narrowly defined three legitimate interests justifying state limitation on dissemination of obscenity: ". . . a specific and *limited* state concern for juveniles . . . an assault upon individual privacy by publication in a manner so obtrusive as to make it *impossible* for an unwitting individual to avoid exposure to it . . . [and] the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463." [emphasis added]. *Stanley* mentioned only two of those dangers: "obscene material might fall into the hands of children . . . or . . . it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567.

As found by the Court below, none of these dangers were present in the distribution of *I am Curious (Yellow)* by appellees and, we maintain, these dangers do not individually or collectively justify outright state prohibition of the exhibition of any motion picture on grounds of obscenity. Therefore, the Court below was correct in its preliminary judgment that state laws which so prohibit motion picture exhibition are unconstitutional.

It is possible to satisfy each of the dangers listed in *Redrup* and *Stanley* by means short of outright proscription of a film and, in the area of First Amendment rights, only the least re-

strictive approach is permissible. See, *e.g.*, *Shelton v. Tucker*, 364 U.S. 479 (1960).

The *Shelton* case involved an Arkansas statute requiring public school teachers to list organizational affiliations. This Court held that that statute "must be viewed in light of less drastic means for achieving the same basis purpose," 364 U.S. at 488.[3] Similarly, in *Martin v. City of Struthers*, 319 U.S. 141, 147 (1941), this Court set aside on First Amendment grounds an ordinance prohibiting all door-to-door solicitors, because the danger of fraud can "be so easily controlled by traditional legal methods . . . ." See also *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964):

> ". . . a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

This "no more restrictive than necessary" approach has also governed this Court's disposition of motion picture censorship schemes designed to ferret out obscenity. In *Freedman v. Maryland*, supra, this Court held that, because of its "potentially chilling effect . . . on protected expression" (380 U.S. at 61), any prior censorship scheme must provide for a "prompt, final judicial decision," (*Id.* at 59), *i.e.*, it must provide the smallest possible restriction of First Amendment rights.[4] See, also, *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

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[3] That doctrine was reaffirmed by this Court in *Dandridge v. Williams*, ___ U.S. ___ (No. 131; O.T. 1969, April 6, 1970): "[In] a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps as broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. See, *e.g.*, *Shelton v. Tucker*, 364 U.S. 479."

[4] Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940): "In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe upon the protected freedom."

The facts of the instant case prove that the outright banning of "obscene" movies is more restrictive than is necessary to protect legitimate state interests. As held by the Court below, the risk that the film will be viewed by juveniles has been handled by policing "the theater . . . so that no minors are permitted to enter." (Appendix ("App."), p. 32). On the other hand, there is no social danger created by adult consumption of obscenity which would justify state prohibition. *Stanley, supra,* 394 U.S. at 566-567:

> ". . . Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence.[5] There appears to be little empirical basis for that assertion . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."

The danger of intrusion of offensive matter upon adults can be disposed of by advertising or a warning of the nature of the film posted at the theater entrance. The Court below found, and appellants do not deny, that "[p]laintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended." (App. 32).

The "pandering" danger described in *Ginzburg, supra,* is not an issue in this case and can clearly be regulated short of banning the film, notably by prohibiting pandering.[6] As

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[5]Cf. the argument made by appellants herein that the State may ban obscenity on the "assumption" that "visual access to obscene and pornographic stimuli may induce crimes of violence and sexual crimes." (Appellants Brief ("App. Br."), p. 18).

[6]Cf. *Stanley,* 394 U.S. at 566-567: ". . . in the context of private consumption of ideas and information we adhere to the view that '[a]mong free men, the deterents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . *Whitney v. California,* 294 U.S. 357, 378 (1927) (Brendeis, J., concurring)."

Ginzburg demonstrates, obscene pandering need not relate to an independently obscene product. Thus, it makes no sense to ban a product on the vague ground that pandering advertising might be used in its sale or promotion.

Therefore, the Court below correctly applied the reasoning of *Stanley* in finding that the Massachusetts statute was unnecessarily broad in its attempt to protect the public from the dangers of obscenity. This, we suggest, was the underlying rationale of the *Stanley* holding that the First Amendment protects purely private viewing of obscene material—*i.e.*, that so long as the dangers of obscenity are obviated, the First Amendment protects all communication, even the obscene.

II.

FEDERAL COURTS SHOULD NOT ABSTAIN FROM RULING ON THE CONSTITUTIONALITY OF STATE STATUTES WHICH, AS ENFORCED, THREATEN TO ABRIDGE FIRST AMENDMENT RIGHTS

Appellants urge that the Court below erred in refusing to stay its decision until the Supreme Judicial Court of Massachusetts could pass upon the constitutionality of the statute in question, especially since the "statute is fairly susceptible to construction which would readily eliminate the constitutional objection." (App. Br., p. 36). The district court, on the contrary, held that the statute is not "susceptible to a construction which would save it from overbroadness," and that abstention would be improper, citing *Zwickler v. Koota*, 389 U.S. 241 (1967). *Amici* concur with the court below.

There are several reasons why U.S. Courts should not abstain in cases like the instant one: (1) repeated prosecutions of motion picture exhibitors amount to a prior restraint upon exhibition of the films in question, which should be subject to the requirement of a rapid adjudication on the merits, cf. *Freedman* and *Teitel, supra*; (2) the economic burden upon distributors and exhibitors of films which come under attack on obscenity grounds has a chilling effect on First Amendment rights and, wherever possible, should be lessened by

rapid and wide reaching adjudications; and (3) the issue ruled upon by the Court below went to the basic method of regulation clearly spelled out in the statute in question and, therefore, no interpretation of that statute could obviate the constitutional issue.

The way in which state obscenity laws—virtually all of which involve criminal sanctions—are enforced is designed, at once, to create a great deterent to free expression and little protection for persons wishing to communicate matter which raises a colorable argument that it is obscene. This is because prosecutors, as in the instant case, are free to charge a new violation of the law with each showing of a motion picture until the ultimate question of the obscenity of the picture is finally adjudicated by this Court. Such multiple prosecutions, actual or threatened,[7] can have but one effect: inhibiting the free distribution of materials under attack. See *Dombrowski v. Pfister*, 380 U.S. 479, 487. This is what happened to *I Am Curious (Yellow)* in Massachusetts; two prosecutions, one conviction and the threat of additional prosecution resulted in plaintiffs' decision to cease exhibition of the picture—it has not been shown in Massachusetts since November 12, 1969. Thus, despite the absence of the "prompt, final judicial decision" on the film's obscenity required by *Freedman* (380 U.S. at 59), Massachusetts has effectively barred its exhibition.

In addition, multiple prosecutions in one jurisdiction, let alone in many,[8] creates a great economic burden upon distributors and exhibitors of motion pictures. To require that, in order to exercise First Amendment rights, one must have

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[7] "'[T]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . . .' *NAACP v. Button*, 371 U.S. 415, 433." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

[8] Grove Press, the sole United States distributor of *I Am Curious (Yellow)*, is presently participating in some 25 lawsuits in 15 states contesting whether the picture may be exhibited in theaters to adults.

the large financial resources needed to participate in such litigation, is repugnant to the freedom of expression which the First Amendment guarantees. This is implicit in the reasoning of *Dombrowski, supra*, and *Zwickler v. Koota*, 389 U.S. 241 (1967).

The need for procedural safeguards against censorship resulting from multiple obscenity prosecutions is manifest. Without exploring the difficult and delicate problems posed by the definition of such safeguards in cases involving enforcement of a valid criminal statute,[9] this Court has made clear that the federal courts must entertain First Amendment challenges to the constitutionality of those statutes. *Dombrowski v. Pfister, supra; Zwickler v. Koota, supra.*

In *Dombrowski* this Court held that standing to bring such suits is extraordinarily broad

> "because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' *NAACP v. Button, supra*, 371 U.S., at 433. If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." 380 U.S. at 486-487.

For the Court below to have abstained in deference to the courts of Massachusetts would have certainly violated the dictate of this Court in *Zwickler*, "that abstention is not to be ordered unless the state statute is of an uncertain nature and is obviously susceptible of a limiting construction." 389 U.S.

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[9]This Court has indicated the need for such protection; see, *Marcus v. A Search Warrant of Property*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 213 (1964) (Brennan, J. plurality opinion): "[if] seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books;" and *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

at 251 (footnote 14). The Court below held that such a "limiting construction" was not possible: "if our interpretation of *Stanley* is correct, we find it difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness." (App. 36). This is because the plaintiffs in this case, as in *Zwickler*, 389 U.S. at 249-250, make a "constitutional attack . . . that the statute, although lacking neither clarity nor precision, is void for 'overbreadth' . . . ."

As discussed in Part I of this Brief, "overbreadth" is very much the issue in this case and, no less than in Zwickler, it was "the duty of a federal court to decide the federal question when presented to it." (389 U.S. at 251).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY, ET AL. *v.* KARALEXIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 83. Argued April 30, 1970—Reargued November 17, 1970—Decided February 23, 1971

Appellees, indicted for violating the Massachusetts obscenity law as a result of exhibiting the film, "I am Curious (Yellow)," brought this action in the federal district court for an injunction against the enforcement of the statute and for a declaration of its unconstitutionality. A three-judge District Court, holding that appellees might be irreparably injured if unable to show the film, granted injunctive relief. *Held:* The District Court made no finding that the threat to appellees' federally protected rights "[could] not be eliminated by [their] defense against a single criminal prosecution," to meet the great and immediate irreparable injury requirement of *Younger* v. *Harris*, *ante*, p. 37, at 46, before a federal injunction of state criminal proceedings can properly issue. The judgment is therefore vacated and the case remanded for reconsideration in the light of *Younger*, *supra*, and *Samuels* v. *Mackell*, *ante*, p. 66.

306 F. Supp. 1363, vacated and remanded.

Robert H. Quinn, Attorney General of Massachusetts, *pro se*, argued the cause for appellants on the original argument and on the reargument. With him on the brief were *Joseph J. Hurley*, First Assistant Attorney General, *John J. Irwin, Jr.*, *Ruth I. Abrams*, and *Lawrence P. Cohen*, Assistant Attorneys General, *Garrett H. Byrne*, *pro se*, and *Theodore A. Glynn, Jr.*

Nathan Lewin and *Alan M. Dershowitz* argued the cause for appellees on the reargument. *Edward de Grazia* and *Mr. Lewin* argued the cause for appellees on the original argument. With them on the brief was *Herbert S. Swartz.*

Peter L. Strauss argued the cause for the United States on the reargument as *amicus curiae* urging reversal. *Francis X. Beytagh, Jr.*, argued the cause for the United States on the original argument. With them on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit*, and *Roger A. Pauley*.

Briefs of *amici curiae* urging affirmance were filed by *Stanley Fleishman* and *Sam Rosenwein* for National General Corp. et al., and by *Thomas R. Asher, Michael Schneiderman*, and *Melvin L. Wulf* for the American Civil Liberties Union et al.

PER CURIAM.

This is an appeal from the order of a three-judge court granting a preliminary injunction against any civil or criminal proceedings in state courts against the appellees. Appellant Byrne is the district attorney of Suffolk County, Massachusetts. The appellees own and operate a motion picture theatre in Boston. As a result of exhibiting the film entitled "I am Curious (Yellow)" at their theatre, appellees were charged by District Attorney Byrne with violating Massachusetts General Laws, Chapter 272, § 28A, which prohibits the possession of obscene films for the purpose of exhibition.[1]

After the filing of the original state indictments against them appellees brought the present action in federal

[1] Mass. Gen. Laws, c. 272, § 28A, provides:

"Importing, printing, distributing or possessing obscene things.

"Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . ."

court.[2] They sought an injunction against both pending and future prosecutions under the Massachusetts obscenity law, and a declaration that the state obscenity law was unconstitutional on its face and as applied.[3] The

[2] While the federal action was pending those indictments were dismissed for defects under Massachusetts law and new state indictments were returned. Under these circumstances we treat the State prosecution as pending at the time the federal suit was initiated.

[3] The appellees' prayer for relief, as amended, read as follows:

"Wherefore, plaintiffs pray:

"(1) That a preliminary injunction and a permanent injunction be granted prohibiting the defendant, his agents or servants, from any further seizures of prints of the motion picture 'I Am Curious (Yellow)' without a prior adversary proceeding in an appropriate court in Massachusetts as to the alleged obscenity of the motion picture.

"(2) That the Court order the defendant to return to the plaintiffs herein the print of the motion picture 'I Am Curious (Yellow)' seized by the defendant, his agents or servants, on Thursday, May 29, 1969; that the Court order the suppression of its evidence in the cases now pending against the plaintiffs herein in Suffolk Superior Court as aforesaid; both for the reason that there was no prior adversary proceeding before seizure of the print, which was then exhibited to the Grand Jury and the basis upon which indictments were returned.

"(3) That this Court order a preliminary injunction, and that following appropriate hearing, a permanent injunction, against the defendant, his agents or servants, from any further continuation of the prosecution of the plaintiffs herein in the said six actions now pending in the Suffolk Superior Court (Docket numbers 42587, through 42592) until such time as the said Sections 32 and 28A of Massachusetts General Laws, Chapter 272, have been appropriately altered and amended.

"(4) Your plaintiffs further pray that an injunction issue restraining this prosecution of the motion picture 'I Am Curious (Yellow),' or any further prosecution in this jurisdiction of the motion picture 'I Am Curious (Yellow)' on the grounds that it is 'allegedly obscene.' Plaintiffs contend and pray herein on the basis that any such prosecution is 'without hope of success.' . . .

"(5) That this Court declare and say that Section 28A of Chapter 272 of the Massachusetts General Laws is unconstitutional

three-judge District Court held that appellees had a probability of success in having the statute declared unconstitutional, that abstention would be improper, and that appellees might suffer irreparable injury if they were unable to show the film. The three-judge court, one judge dissenting, therefore granted a preliminary injunction, forbidding the initiation of any future prosecutions or the execution of the sentence imposed in the state proceedings then pending. 306 F. Supp. 1363 (1969). The district attorney appealed. We granted a stay of the district court order, 396 U. S. 976 (1969), and subsequently noted probable jurisdiction, 397 U. S. 985 (1970).

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of [*sic*] its face, and unconstitutional in its application to the plaintiffs herein, all in accordance with Title 28 U. S. C., Section 2201:

"(6) That this Court declare and say that the motion picture 'I Am Curious (Yellow)' is not obscene within the constitutional definition of obscenity as set forth by the United States Supreme Court in *Redrup* v. *New York*, 386 U. S. 767 (1967). . . .

"(7) That this Court restrain any future prosecutions of the motion picture 'I Am Curious (Yellow)' on the grounds that it is 'allegedly obscene' within the terms of Section 28A of Chapter 272, for the reason that there is no way that any future defendant in such prosecution could 'know the work to be obscene.'

"(8) That any further prosecutions of the motion picture 'I Am Curious (Yellow)' on the grounds that it is 'allegedly obscene' and therefore violative of Section 28A of Chapter 272 of Massachusetts General Laws be restrained until such time as the Massachusetts courts affirm that the standards for finding a work obscene within the constitutional definition of obscenity as set forth in *Redrup* v. *New York*, *supra*, are that—(1) That the work was being shown to those under the age of 18; (2) Or that the work was an invasion of privacy; or (3) That the work was being advertised in a 'pandering' manner.

"(9) That this Court issue an injunction restraining any further prosecutions of the plaintiffs herein for the showing of the motion picture 'I Am Curious (Yellow)' on the grounds that any prosecution is 'without hope of success' . . .

"(10) For such other and further relief as this Court shall deem essential or proper in accordance with Equity and Law."

In discussing the subject of irreparable injury, the court said:

> "We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset. It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. *See* Dombrowski v. Pfister, 1965, 380 U. S. 479, 486–489." 306 F. Supp., at 1367.

There was, however, no finding by the District Court that the threat to appellees' federally protected rights is "one that cannot be eliminated by [their] defense against a single criminal prosecution." *Younger* v. *Harris, ante,* at 46. Because the District Court, in considering the propriety of injunctive and declaratory relief in this case, was without the guidance provided today by our decisions in *Younger* v. *Harris, supra,* and *Samuels* v. *Mackell, ante,* p. 66, we vacate the judgment below and remand for reconsideration in light of those decisions.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this appeal.

[For concurring opinion of MR. JUSTICE STEWART, see *ante,* p. 54.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

The injunction appealed from issued December 6, 1969, after appellees' convictions in state court on November 12,

1969, of exhibiting an obscene film in violation of state law. In the absence of any showing of bad faith or harassment, appellees were therefore obliged to pursue their constitutional defenses on appeal from the convictions to the state appellate court, and the Federal District Court erred in enjoining appellants from interfering with future showings of the film. *Freedman* v. *Maryland*, 380 U. S. 51, 60 (1965), limited to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of prompt, final, judicial determination of the question of the film's alleged obscenity. See also *Lee Art Theater* v. *Virginia*, 392 U. S. 636 (1968). But there was no interference from July through November; appellant Byrne honored a stipulation made July 15 in federal court not to seize the film or interfere with its exhibition pending the outcome of the trial. Byrne withdrew from the stipulation and threatened to move against further exhibition of the film only after the convictions were obtained. Clearly, he was not required to continue to stay his hand pending the outcome of appeals from the convictions; *Freedman* was satisfied by a "prompt judicial decision *by the trial court*," *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139, 142 (1968) (emphasis supplied); *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676, 690 n. 22 (1968). Rather than remand I would therefore reverse the judgment of the District Court for the reasons stated in my opinion in *Perez* v. *Ledesma*, *ante*, p. 93.